Supreme Court, U.S.
FILED

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No. 96-1940 JUN 4 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

THE JAQUES ADMIRALTY LAW FIRM,

Petitioner,

v.

ACandS, Inc., ACMC f/k/a National Gypsum Company, ACME Brick Co., Acorn Iron and Supply Co., Allis-Chalmers Corp., The Allpax Co., Inc., Anchor Packing Co., Argo International Corp., Armstrong World Industries, Auburn Manufacturing Co., Aurora Pump Division of General Signal Corp., Bethlehem Steel Corp., Bigelow-Liptak Corp., A. B. Boyd Co., Bryan Steam Corp., Carborundum Co., Certainteed Corp., Champion International, Chemseco, Coffin Pump, Inc., Coltec Industries Inc., Alfred Conhagen Inc., Crosby Steam and Valve Co., Crown, Cork and Seal Co., Inc., Dana Corp., The Darcoid Co., Inc., Donlee Technologies, Inc., Durabla Manufacturing Co., Ellicott Machine Corp., Elliot Co., Everlasting Valve Co., Excelsior Inc., Fel-Pro Inc., Felt Products Inc., Fibreboard Corp., Flexitallic, Inc., Flintkote Co., GAF Corp., Gatke Corp., General Cable Co., General Refractories, Goodall Rubber Co., B. F. Goodrich, Goodyear Tire & Rubber Co., Goulds Pumps Inc., A. P. Green Industries, Inc., Greene Tweed and Co., Hajoca Corp., Harbison-Walker Refractories Group, The Home Rubber Co., Indian Head Industries, Inc., Ingersoll-Dresser Pump, Ingersoll-Rand Corp., James Walker Manufacturing Co., Janos Industrial Insulation Corp., John Crane Inc., La Favorite Industries, Inc., The Lunkenheimer Co., Melrath Gasket, Inc., Morrison Bros. Co., Mortell Co., Owens-Corning Fiberglas Corp., Owens-Illinois, Inc., USX Corp., Warren Pumps, Inc., Pittsburgh Corning Corp., PPG Industries, Inc., Noland Co.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED FOR REVIEW

Whether the petitioner was denied due process of law by the failure of the court below to provide or require proper notice prior to imposition of appellate sanctions?

II.

PARTIES TO THE PROCEEDING

The Petitioner

Although Alan Kellman, Esq., affixed his signature for the Law Firm to the pleadings to this cause, he was acting in a representative capacity for the Law Firm and in reality, the Jaques Admiralty Law Firm is comprised of a group of lawyers who are associates of the Firm and are counsel for each of the respective Plaintiffs of this cause. Therefore, the sanctions imposed were indeed borne by the Jaques Admiralty Law Firm. Hereafter, the party known to have been sanctioned is the Jaques Admiralty Law Firm.

Parties to the proceeding in the Court whose judgment is sought to be reviewed:

The plaintiff-appellants:

> Norman D. Abar, et al. and Creighton E. Miller, Administrator for the Estate of Isaac W. Abraham, et al.
>
> * Although plaintiff-appellants were parties to the appeal below, they have no interest in this attorney sanctions appeal.

The defendant-appellees:

> ACandS, Inc., Alfred Conhagen, Inc., Anchor Packing Co. & Coltec Industries, Aurora Pump Division of General Signal Corp., B.F. Goodrich, Champion International, Coffin Turbo Pump, Inc., Durable Manufacturing Co., Elliot Co., Everlasting Valve Co., Excelsior Inc., Fel-Pro Inc. & Felt

II.

PARTIES TO THE PROCEEDING – Continued

Products Manufacturing Co., Flintkote Co., General Cable Co., Goodyear Tire & Rubber Co., Greene Tweed Co., The Home Rubber Co., Indian Head Industries, Inc., Ingersoll-Dresser Pump Co., James Walker Manufacturing Co., Mortell Co., Norton Co., The Okonite Co., Owens-Corning Fiberglass Corp., Owens-Illinois, Inc., PPG Industries, Inc., Pittsburgh Corning Corp., Plibrico Co., Quaker Construction Products Co., Sherwin-Williams Co., USX Corp., Vellumoid, Inc., Viking Pump, Inc., Warren Pumps, Inc.

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III.

OPINIONS AND ORDERS REPORTED

None of the opinions or orders entered in the underlying litigation have been reported "officially". The Ninth Circuit's decision affirming the district court and imposing sanctions is listed as a "table case" at 83 F.3d 426 (9th Cir. 1996). That decision is reported unofficially at 1996 WL 183752.

IV.

BASIS OF JURISDICTION

A. Jurisdiction in this Court

Pursuant to Supreme Court Rule 14(e), Petitioner states that jurisdiction lies in this Court by virtue of the following:

(i) Date judgment or order sought to be reviewed was entered:

> The United States Court of Appeals for the Ninth Circuit filed its Memorandum affirming the ruling of the United States District Court for the Southern District of California on April 16, 1996; the Memorandum also granted sanctions pursuant to Fed. R. App. P. 38 against Plaintiffs-Appellants' attorney. [App. 1]
>
> A Judgment in accordance with the Ninth Circuit's ruling was filed on July 8, 1996 [App. 79].
>
> On April 19, 1996, the Ninth Circuit's Appellate Commissioner filed his Order for submission of applications for attorneys' fees and

double costs to be awarded as sanctions against Plaintiffs-Appellants' attorney [App. 46]. This Order gave Defendants-Appellees 30 days in which to file their applications for attorneys' fees and double costs, and required Plaintiffs-Appellants' attorney to file a response within 45 days. Plaintiffs-Appellants filed a timely response to all applications which were filed within the requisite time period and served on their attorney.

On April 30, 1996, Plaintiffs-Appellants filed their Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond [App. 69].

On June 7, 1996, the Ninth Circuit denied Plaintiffs-Appellants' Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond [App. 77].

On September 16, 1996, the Appellate Commissioner filed his Order quantifying the amount of the award of attorneys' fees and double costs [App. 22].

On September 30, 1996, Plaintiffs-Appellants filed their Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs [App. 9].

(ii) Date of orders respecting rehearing:

On March 6, 1997, the United States Court of Appeals for the Ninth Circuit filed its Order denying Plaintiffs-Appellants' Motion for Reconsideration of Portions of the Appellate

Commissioner's Order Granting Attorneys' Fees and Double Costs [App. 7].

(iii) Petitioner does not rely on Rule 12.5.

(iv) Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question:

> This Court has jurisdiction to review the Judgment and Orders in question pursuant to 28 U.S.C. § 1254, which states:
>
> > Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> >
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]
>
> Under Supreme Court Rule 13.1, this Petition is timely as it is being filed within 90 days of the Ninth Circuit's March 6, 1997, Order denying reconsideration.

(v) This provision is not applicable to this proceeding.

B. Jurisdiction in the Lower Courts

The Complaint filed on July 22, 1993, in the United States District Court for the Southern District of California alleged federal question jurisdiction and diversity jurisdiction under 28 U.S.C. § 1332 and was an admiralty case within the meaning of Fed. R. Civ. P. 9(h). An Order dismissing the Complaint was entered on January 18, 1994. On January 31, 1994, Plaintiffs filed a Motion for

Relief from Judgment pursuant to Fed. R. Civ. P. 60(b). This Motion was denied on March 14, 1994, via the District Court's Order Denying Motion for Relief from Judgment of Dismissal.

A Claim of Appeal as of right from the District Court's Order was timely filed in the United States Court of Appeals for the Ninth Circuit on April 14, 1997.

V.

CONSTITUTIONAL PROVISIONS AND COURT RULES PRIMARILY RELIED UPON BY PETITIONER

Fed. R. App. P. 38, as amended April 29, 1994, effective December 1, 1994, provides:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

The Due Process Clause to the Fifth Amendment of the United States Constitution provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . "

VI.

STATEMENT OF THE CASE

The relevant facts are few, and not in dispute. In the underlying cases the petitioner brought suit on behalf of numerous merchant mariners who were exposed to the respondents' asbestos products during their sailing

careers. Respondents moved the district court for dismissal based upon Fed. R. Civ. P. 8(a). Those motions were granted. The merchant mariners sought relief under Fed. R. Civ. P. 60(b), which the district court denied. The merchant mariners appealed the latter ruling to the United States Court of Appeals for the Ninth Circuit.

Although the Ninth Circuit stated in its Memorandum that "[s]everal defendants" had requested sanctions, counsel has reviewed the briefs and related joinder papers filed by the Appellees and has found only **one** respondent which requested sanctions, namely Owens-Illinois. *See* Owens-Illinois' Brief in No. 94-55624 at 12-13, 19 [App. 62]; Owens-Illinois' Brief in No. 94-55677 at 12-13, 19 [App. 55]. In its brief, Owens-Illinois asked for Rule 38 sanctions. **None** of the other Appellees even cited Rule 38 in their papers, much less asked for sanctions.

By Memorandum dated April 16, 1996 [App. 1], a panel of the Ninth Circuit rejected the appeal and affirmed the decisions of the district court. The final paragraph of the Memorandum recites in full:

> Several defendants requested sanctions under Rule 38 alleging that this appeal was frivolous. The Court agrees and all defendants are awarded sanctions against the plaintiffs' attorney for attorneys' fees and double costs. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) (sanctions need not be sought to be awarded), *cert. denied*, 474 U.S. 1021 (1985). This matter is referred to the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant.

Pursuant to the award of sanctions in the Court's Memorandum, on April 19, 1996 the Appellate Commissioner issued an Order for the defendant-appellees to submit applications for double costs and attorneys' fees within 30 days, and for plaintiffs' counsel to respond to those applications within 45 days [App. 46].

The Memorandum Disposition and the Commissioner's Order were mailed together, and were received in Detroit by plaintiffs' counsel on April 23, 1996. After receipt of the Ninth Circuit's Memorandum, Plaintiffs-Appellants filed their Motion to Vacate Summary Imposition of Rule 38 Sanctions [App. 69]. Relying on Fed. R. App. P. 38, as amended on April 29, 1994, the Motion asserted that because there was no separately filed motion or notice from the Ninth Circuit that sanctions were being contemplated and no reasonable opportunity to respond, the award of sanctions was improper. Without providing any reasons or law supporting its ruling, even in the face of the plain language of Rule 38, the Ninth Circuit summarily denied Plaintiffs-Appellants' Motion to Vacate on June 7, 1996 [App. 77].

In the intervening time period, on April 19, 1996, the Ninth Circuit's Appellate Commissioner issued his Order requiring submission of applications for attorneys' fees and double costs to be awarded as sanctions against Plaintiffs-Appellants' attorney [App. 46]. The Order gave Defendants-Appellees 30 days in which to file their applications, and required a response by Plaintiffs-Appellants' attorney within 45 days of the Order. Plaintiffs-Appellants filed timely responses to all applications that were properly filed and served on their attorney. The

Appellate Commissioner thereafter filed an Order quantifying the amount of the award on September 16, 1996 [App. 22]. In accord with *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La.*, 38 F.3d 1414 (5th Cir. 1994), the award of Rule 38 sanctions became appealable as of that date. Plaintiffs-Appellants sought reconsideration of portions of that award by Motion filed on September 30, 1996 [App. 9]. Because the Ninth Circuit denied the Motion on March 6, 1997, Petitioner now seeks a Writ of Certiorari from this Court.

VII.

ARGUMENT

A. Grounds for Grant of Certiorari

Petitioner urges the grant of a writ of certiorari pursuant to this Court's Rule 10, as follows:

(1) The decision by the United States Court of Appeals for the Ninth Circuit in the underlying case is contrary to the decisions of every federal court of appeals which has addressed Federal Rule of Appellate Procedure 38, as amended in 1994;

(2) The United States Court of Appeals for the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" (Rule 10(a));

(3) The United States Court of Appeals for the Ninth Circuit "has decided an important question of federal law [albeit *sub silentio*] that has not been, but should be, settled by this Court".

(Rule 10(c)). That question is whether strict compliance is required with the procedural provisions of Federal Rule of Appellate Procedure 38.

B. The Undisputed Facts Show that the Ninth Circuit Disregarded the Express Mandate of Rule 38.

1. A Very Clear Provision

Fed. R. App. P. 38, as amended April 29, 1994, effective December 1, 1994, provides:

> If a court of appeals determines that an appeal is frivolous, it may, ***after a separately filed motion or notice from the court and reasonable opportunity to respond,*** award just damages and single or double costs to the appellee.

(Emphasis supplied.) As the Advisory Committee Note to the 1994 amendment explains:

> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion

> filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

One commentator on federal procedure notes that promulgation of the amended Rule has settled a previous split of authority over proper procedure to be followed in imposing sanctions. 9 James W. Moore, et al., *Moore's Federal Practice* ¶ 238.04 at pages 38-20, 38-21 (2d ed. 1996). The commentator goes on to state:

> What constitutes notice? A statement or request in a brief does not. Only a separately filed motion is sufficient; absent a motion, the notice must come from the court.

Id. There is no dispute that the requisite prior notice never was given.

2. Rule 38's Plain Meaning Must Govern.

As this Court has recognized, rules of court, like other statutes[1], are to be accorded their plain meaning. In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989), this Court refused to extend Fed. R. Civ. P. 11 to permit imposition of sanctions against law firms:

---

[1] For the proposition that statutes ought to be applied in accord with their plain meaning, *see also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) (plain meaning of legislation normally should be conclusive); *Demerest v. Manspeaker*, 498 U.S. 184 (1991) (when court finds statute unambiguous judicial inquiry is complete); *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) (where intent of Congress is clear, that is the end of the matter).

> We give the Federal Rules of Civil Procedure their plain meaning, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750, n. 9, (1980), and generally with them as with a statute, "[w]hen we find the terms . . . unambiguous, judicial inquiry is complete," *Rubin v. United States*, 449 U.S. 424, 430 (1981).

The Court wrote that "Our task is to apply the text, not to improve upon it." 493 U.S. at 126. The Court also rejected arguments to the effect that "the Rule does not mean what it most naturally seems to say." 493 U.S. at 127.

3. The Ninth Circuit's Other Decisions Demonstrate Understanding of the Rule's Mandate.

The Ninth Circuit's failure to heed Rule 38's mandate is a complete puzzlement to Petitioner. Not one but *many* decisions of that court since the 1994 amendment to the Rule have held that a request for sanctions is not properly before the court unless made via separately filed motion. As the Ninth Circuit wrote on March 7, 1996, in denying a request for Rule 38 sanctions:

> Appellees . . . request an award of attorney fees and costs, contending the Gabors' appeal is frivolous. The appellees request these fees only in their appellate briefs and not in a separately filed motion.
>
> The 1994 amendment to Federal Rule of Appellate Procedure 38 permits an award under this rule only "after a separately filed motion or notice from the court and reasonable opppportunity to respond." The advisory committee notes to this amendment state that a request for

> sanctions in a party's appellate brief does not provide sufficient notice to the opposing party.

Gabor v. Frazer, 78 F.3d 459 (9th Cir. 1996).[2]

For other *published* decisions of the Ninth Circuit recognizing this principle, *see In re Del Mission Ltd.*, 98 F.3d 1147, 1154 (9th Cir. 1996) ("A request made in an appellate brief does not satisfy Rule 38"); *In re American Continental Corp.*, 102 F.3d 1524, 1536 n.11 (9th Cir. 1996) (request for sanctions would not be considered unless properly made via separate motion).[3]

---

[2] Petitioners cited *Gabor* to the court below in its motion to vacate the imposition of sanctions. App. 69.

[3] Moreover, there is a veritable multitude of unpublished decisions by the Ninth Circuit, recognizing the proper procedure for imposition of appellate sanctions. *See In re Sovereign Partners*, 110 F.3d 70 (table), 1997 WL 160279, 1997 U.S.App.LEXIS 6598 (9th Cir., April 4, 1997) (citing *In re American Continental Corp.*, 102 F.3d 1524, 1536 n.11 (9th Cir. 1996, noting that "we decline to rule on Circle J's request for sanctions, as it is not properly before us."); *In re Wall*, 108 F.3d 340 (table), 1997 WL 74470, 1997 U.S.App.LEXIS 3139 (9th Cir., February 18, 1997) (request denied without prejudice to party's filing a separate motion for sanctions); *Regal Capital, Inc. v. Valencia*, 106 F.3d 408 (table), 1997 WL 31139, 1997 U.S.App.LEXIS 1105 (9th Cir., January 21, 1997) (request denied without prejudice to party's filing a separate motion for sanctions); *Aguilar v. Sunland Beef Co.*, 89 F.3d 844 (table), 1996 WL 218188, 1996 U.S.App.LEXIS 11049 (9th Cir., April 29, 1996) (noting 1994 amendments to Rule 38); *In re Lund*, 83 F.3d 427 (table), 1996 WL 183658, 1996 U.S.App.LEXIS 9756 (9th Cir., April 12, 1996) (not presented as separate motion; sanctions denied); *Payne v. Exxon Corp.*, 73 F.3d 370 (table), 1995 WL 766016, 1995 U.S.App.LEXIS 38376 (9th Cir., December 29, 1995) (request for sanctions in brief did not comply with Rule 38's 1994 amendments); *Shiloh v. Reader's Digest Ass'n, Inc.*, 62 F.3d

4. Decisions of Other Federal Circuits are Clear that Strict Compliance with Rule 38 is Required.

The Ninth Circuit's decision not only violates Fed. R. App. P. 38 and its own decisions on the matter, but also the decisions of every other United States Court of Appeals which address the correct notice procedure under the Rule as amended. The factor set forth in this Court's Rule 10(a) is thus satisfied.

The decisions of the various Federal Circuits speak with one voice: Rule 38 as amended means what it says.

Second Circuit

In *Ullman-Briggs, Inc. v. Deerfield Housewares, Inc.*, 100 F.3d 942 (table), 1996 WL 20512, 1996 U.S.App.LEXIS 2435 (2d Cir., January 19, 1996), the court stated the obvious: "A statement in a party's brief requesting sanctions is not equivalent to a separately filed motion."

1425 (table), 1995 WL 465774, 1995 U.S.App.LEXIS 22927 (No. 94-56425, August 7, 1995) (denying sanctions where no separate motion filed); *In re Rudnick*, 62 F.3d 1425 (table), 1995 WL 460360, 1995 U.S.App.LEXIS 22469 (9th Cir., August 3, 1995) (30 day show-cause order issued); *In re Allustiarte*, 62 F.3d 1423 (table), 1995 WL 460407, 1995 U.S.App.LEXIS 22468 (9th Cir., August 3, 1995); *Fordjour v. Forties Benefits Insurance Co.*, 57 F.3d 1076 (table), 1995 WL 341562, 1995 U.S.App.LEXIS 14446 (No. 94-16484, June 8, 1995) (refusing to impose sanctions in absence of separately-filed motion, even though court believed that appeal was "wholly without merit").

Sixth Circuit

In *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 181 (6th Cir. 1996) (where parties levelled cross-charges that appeal and cross-appeal were frivolous, court "decline[d] to consider either of these requests as they were not made in a separately filed motion as Rule 38 requires.")

In *Clark v. Central Cartage Co.*, 73 F.3d 361 (table), 1995 WL 758459, 1995 U.S.App.LEXIS 38820 (6th Cir., December 21, 1995), the court dismissed a request for Rule 38 sanctions made in a party's brief, observing that

> Were we otherwise inclined to grant the company's request . . . we could not do so because the company has failed to comply with the procedure set out in the rule, as amended. . . . We DISMISS the appellee's motion for sanctions because it is not properly presented.

See also the very recent decision in *T.G.C. Corp. v. Park*, 1997 WL 234614, 1997 U.S.App.LEXIS 10637 (6th Cir., May 6, 1997), in which the Sixth Circuit stated that "Even if we were to assume that this appeal is frivolous, defendants have failed to comply with the notice requirements of Rule 38."

Seventh Circuit

In *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256, 258 (7th Cir. 1995), the appellee, like Owens-Illinois herein, requested Rule 38 sanctions in her brief. The Seventh Circuit stated, "We cannot honor such a request". Noting that the amended rule requires a separate motion or notice from the court, the Court held that "Ms. McDonough's brief-borne request is not a separately filed

motion." Accordingly, the Court would "defer final determination" of the sanctions issue until respondent had an opportunity to respond. 48 F.3d at 259.

In *Matter of Bero*, 110 F.3d 462, 466 (7th Cir. 1997), the Seventh Circuit stated that

> Before sanctions can be ordered the rule requires either a separate motion for sanctions or a notice from us that sanctions are in the winds.

Compare Schroeder v. K & K Insurance Group, Inc., 70 F.3d 1274 (table), 1995 WL 687663, 1995 U.S.App.LEXIS 34004 (7th Cir., November 16, 1995) (stating "Appellees' separately filed motion has provided the requisite notice to Schroeder of their request for sanctions").

Federal Circuit

In *Nordberg, Inc. v. Telsmith, Inc.*, 82 F.3d 394 (Fed.Cir.1996), at oral argument, the appellee withdrew its claim that the appeal was frivolous when the court "pointed out that it was substantively and procedurally deficient," noting that Fed. R. App. P. 38 requires separate motion or notice from the court and opportunity to respond.

In short, there are many gray areas in the law. This is most assuredly not one of them. The failure of the court below to afford petitioner an opportunity to demonstrate that the appeal in question was non-frivolous is simply inexplicable, and a summary grant of relief is in order.

C. The Undisputed Failure by the Court of Appeals to Play by Its Own Rules Denied Petitioner Due Process of Law.

The Due Process Clause written into the Constitution's Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . " If due process means anything, it means that a court must play by its own rules. As aptly stated in *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988), "The court wrote its own rules; it must abide by them." Likewise, "attorneys have the right to rely upon the rules. A court cannot ignore and circumvent its rules at will to the detriment of those covered by them." 853 F.2d at 390.

The decisions of this Court are clear that where a provision of law – be it statute, court rule, administrative regulation or legislative procedure – specifies a particular procedure, due process requires that the "process due" is the very process *specified* in that provision of law.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954), the petitioner attacked the validity of the Board of Immigration Appeals' denial of his application for suspension of deportation. Accardi claimed that the Attorney General had made a fair hearing of his case impossible by circulating to the Board a list of certain "unsavory characters", including Accardi, whose deportation he desired. This Court, in granting certiorari, noted as the "crucial question"

> whether the alleged conduct of the Attorney General deprived petitioner of any of the rights

> guaranteed him by the statute or by the regulations issued pursuant thereto.

347 U.S. at 265. The Court observed that the regulations, which possessed "the force and effect of law," "prescribe[d] the procedure to be followed in processing an alien's application for suspension of deportation." *Id.* The applicable regulations required that the *Board,* and not the Attorney General, exercise independent discretion to decide such applications. The Court found that the Attorney General's actions amounted to "dictating the Board's decision." 347 U.S. at 267. Since such actions were inconsisent with the "prescribed procedure," the Court set aside the decision below, stating that petitioner was entitled to

> a fair hearing, *which is nothing more than what the regulations accord petitioner as a right.* Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. . . . [A]t least he will have been afforded that due process required by the regulations in such proceedings.

347 U.S. at 268 (both forms of emphasis supplied).

Similarly, in *Yellin v. United States,* 374 U.S. 109 (1963), this Court reversed a contempt conviction based upon a refusal to answer questions before a Congressional committee during a public hearing. Pursuant to one of the committee's own rules (Rule IV), the witness had requested that his testimony be taken in executive session, rather than a public forum. This Court concluded that "the Committee failed to exercise its discretion according to the standards which Yellin had a right to have considered." 374 U.S. at 120. The Court, citing the

Accardi decision, noted that while on remand Yellin might or might not prevail, he was "entitled to have the Committee follow its rules and give him the consideration according to the standards it has adopted in Rule IV." *Id.*

The same principle was well-stated by the Second Circuit in *Montilla v. I.N.S.*, 926 F.2d 162, 164 (2d Cir. 1991), where the court set aside an agency ruling based upon the fact that the tribunal had failed to follow its own rules:

> The notion of fair play animating [the Fifth] amendment precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rulemaker may then with impunity ignore or disregard as it sees fit. The INS may not fairly administer the immigration laws on the notion that on some occasions its rules are made to be broken.

See also Hollingsworth v. Balcom, 441 F.2d 419 (6th Cir. 1971) ("rules and regulations must be followed in order to comply with the requirement of basic fairness implicit in the concept of due process of law.")

The late President Richard Nixon was famous for scolding his audiences that he wanted "to make one thing perfectly clear". Rule 38 was and is "perfectly clear": an appellate court may award sanctions for prosecution of a frivolous appeal, but only where there has been either (1) a "separately filed motion"; or (2) "notice from the court and reasonable opportunity to respond." As in *Accardi, supra*, this is the "prescribed procedure," "which is nothing more than what [Rule 38] accord[s] petitioner as a right." As in *Yellin, supra*, the petitioner herein was "entitled to have the [Ninth Circuit Court of Appeals] follow

its rules and give [them] the consideration according to the standards it has adopted in Rule [38]." Because of the clear, undisputed violation of the petitioner's right to rely upon Rule 38's procedural requirements, this Court should grant certiorari and summarily remand back to the Ninth Circuit for petitioner to be afforded a proper opportunity to be heard on the claim of frivolousness.

VIII.

CONCLUSION

There is no dispute that the requisite process due under Federal Rule of Appellate Procedure 38 was never afforded. Petitioner prays that this Court grant summary relief and direct the court below to afford to it the proverbial "day in court" on this matter.

DATED at Detroit, Michigan, this 31st day of May, 1997.

Respectfully submitted,

THE JAQUES ADMIRALTY LAW FIRM, P.C.

LEONARD C. JAQUES[4]
Counsel for Petitioner
The Jaques Admiralty Law Firm, P.C.

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[4] Admitted to the Bar of this Court on May 4, 1970.

Norman D. ABAR; Horace J. Abbott; Vance Abel; Clarence Abner; Earl Adams, et al., Plaintiffs-Appellants,

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; Acme Brick Company; Acorn Iron and Supply Co.; Allis-Chalmers Corporation; et al., Defendants-Appellees.

Creighton E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiff-Appellant.

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; Acme Brick Company; Anchor Packing Co.; Aurora Pump Division of General Signal Corp.; Bethlehem Steel Corporation; Bigelow-Liptak Corporation; Bryan Steam Corp.; Coffin Pump Inc.; Crown, Cork and Seal Co., Inc.; Dana Corp.; Donlee Technologies, Inc.; Durabla Manufacturing Co.; Everlasting Valve Co.; Fel-Pro Incorporated; Fibreboard Corporation; General Cable Co.; B.F. Goodrich; Goodyear Tire & Rubber Co.; Ingersoll-Dresser Pump; John Crane Inc.; Mortell Co.; Owens-Corning Fiberglas Corp.; Owens-Illinois, Inc.; USX Corporation; Warren Pumps, Inc.; Pittsburgh Corning Corporation, Defendants-Appellees.

Nos. 94-55624, 94-55677.

United States Court of Appeals, Ninth Circuit.

Submitted Nov. 17, 1995.*

Decided April 16, 1996.

Appeal from the United States District Court Southern District of California, Nos. CV-93-01120-JSR, CV-93-01119-JSR; John S. Rhoades, District Judge, Presiding.

S.D.Cal.

AFFIRMED.

Before: BRUNETTI and KOZINSKI, Circuit Judges, and HAGEN,** District Judge.

MEMORANDUM***

The plaintiff mariners in the above cases filed two identical complaints on July 27, 1993 alleging injuries stemming from asbestos exposure. In Miller, an administrator of the estates of 370 decedents brought suit against 93 defendants involved in some phase of the production of either asbestos or products containing asbestos. In Abar, 994 plaintiffs brought suit against the same 93 defendants.

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* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); Ninth Circuit Rule 34-4.

** Hon. David Warner Hagen, United States District Judge for the District of Nevada, sitting by designation.

*** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

In 1991, the United States District Court for the Eastern District of Pennsylvania removed the maritime claims from the Multidistrict Litigation ("MDL") asbestos docket and created a separate maritime asbestos docket. The court appointed Leonard C. Jaques, plaintiffs' counsel in the instant cases, as "lead and liaison counsel" of all maritime asbestos claims. Defendants note that during the same week in July of 1993 in which the Miller and Abar claims were filed, plaintiffs' counsel filed identical complaints in five other federal district courts on behalf of 5000 additional claimants. Prior to the dismissal of the Abar and Miller complaints, the Judicial Panel on Multidistrict Litigation issued a conditional transfer of Abar and Miller to the Eastern District of Pennsylvania. In response to the dismissal, the Panel vacated its order.

The Abar and Miller complaints asserted admiralty and diversity jurisdiction. On appeal, plaintiffs only assert admiralty jurisdiction. The complaints allege that the defendants:

> designed, manufactured, sold or otherwise supplied for use of shipowners aboard vessels harmful toxins and carcinogens including asbestos and asbestos-containing products or machinery and equipment on which the asbestos products were placed . . . on vessels upon which Plaintiffs or Plaintiff's [sic] Decedents served during periods of time when the respective mariners as crewmen were exposed to their detriment to the afore-stated chemicals and products, suffering injury to their person or death of their being as the case may have resulted.

The complaints do not further specify any time or place for the injuries or any connection between specific plaintiffs and specific defendants.

Defendants brought motions to dismiss and the district court concluded that the plaintiffs were improperly joined and dropped all but the first named plaintiff in each complaint, and then dismissed the complaints for failure to comply with the pleading requirements of Fed.R.Civ.P. 8(a). The court found that the plaintiffs 1) failed to provide enough specific details to establish admiralty jurisdiction and 2) failed to provide enough specific details to comply with the requirements of Rule 8(a)(2). The court granted the motions to dismiss both complaints on January 18, 1994 and on January 21, 1994 issued an order to dismiss with leave to amend. Rather than file amended or separate complaints, plaintiffs filed motions for relief from the judgment of dismissal pursuant to Rule 60(b)(6). The district court's denials of the Miller and Abar motions were entered on March 18 and 21, 1994, respectively. Plaintiffs filed notices of appeal on April 14 in Miller and April 15 in Abar. In response to defendants' arguments that their notices were untimely, plaintiffs maintained that they were only appealing the denial of the motions for relief.

Review of motions for relief pursuant to Rule 60(b) "does not bring up the underlying judgment for review; we review only for abuse of discretion." Cel-A-Pak v. California Agric. Labor Relations Bd., 680 F.2d 664, 668 (9th Cir.1982). Relief under Rule 60(b) is only available when "extraordinary circumstances prevented a litigant from seeking earlier, more timely relief . . . circumstances beyond its control. . . . " United States v. Alpine Land &

Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993). See also In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir.1989) (relief appropriate where party had "no opportunity to follow normal paths of appeal" because legislation passed after the judgment was the ground for appeal). A moving party must do more than simply repeat its legal arguments. Blair v. Shanahan, 38 F.3d 1514, 1518 (9th Cir.1994), cert. denied, 115 S.Ct. 1698 (1995).

Plaintiffs argue that the motion for relief should have been granted because joinder of the plaintiffs was appropriate and their pleadings were sufficient to comply with Rule 8. Plaintiffs, however, fail to demonstrate any extraordinary circumstance which prevented them from filing a direct appeal. Their reference to a statute of limitations problem is insufficient as any timeliness bar was not the result of circumstances beyond plaintiffs' control. See Alpine, 984 F.2d at 1049. Thus we decline to consider the merits of the district court's rulings on joinder and specificity.

Plaintiffs also argue that the district court should have allowed removal to the Northern District of Ohio where, according to plaintiffs' attorney, all Abar plaintiffs have a "separate and independent cause of action" and 108 of the Miller plaintiffs have pending wrongful death actions. They appear to argue that even if this Court agrees that its claims should have been dismissed, it should instead order their transfer to the Northern District of Ohio. 28 U.S.C. 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to the district or division where it might have been brought.

The decision to transfer under Section 1404(a) is within the discretion of the district court. Arley v. Union Pacific Ins. Co., 379 F.2d 183, 189 (9th Cir.1967), cert. denied, 390 U.S. 950 (1968).

The district court did not abuse its discretion in refusing to grant the request for transfer. As noted by the district court, in view of the dismissal, there are no civil actions left to transfer. Furthermore, transferring a complaint which should be dismissed achieves neither the convenience nor the justice contemplated by Section 1404(a).

Several defendants requested sanctions under Rule 38 alleging that this appeal was frivolous. The Court agrees and all defendants are awarded sanctions against the plaintiffs' attorney for attorneys' fees and double costs. Hatch v. Reliance Ins. Co., 758 F.2d 409, 416 (9th Cir.1985) (sanctions need not be sought to be awarded), cert. denied, 474 U.S. 1021 (1985). This matter is referred to the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiffs-Appellees, vs. ACandS, INC., et al., Defendant-Appellant.	No. 94-55624 DC# CV-93-1120-JSR Southern California
CREIGHTON E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiff-Appellee, vs. ACandS, INC., et al., Defendants-Appellants.	No. 94-55677 DC# CV-93-1119-JSR Southern California ORDER (Filed Mar. 6, 1997)

Before: BRUNETTI and KOZINSKI, Circuit Judges, and HAGEN,*

The court has received Plaintiffs/Appellants' Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs. The Appellate Commissioner has reviewed the motion for reconsideration and is not inclined to grant reconsideration. The motion for reconsideration has

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* Hon. David Warner Hagen, United States District Judge for the District of Nevada, sitting by designation.

therefore been referred to this panel, which hereby denies the motion for reconsideration.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 94-55624 & 94-55677

Before: Peter L. Shaw, Appellate Commissioner

NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

ACandS, INC., *et al.*,

Defendants-Appellees.

No. 94-55624
D.C. No.
CV-93-01120-JSR

CREIGHTON E. MILLER,
Administrator of the Estate of
ISAAC W. ABRAHAM, SR., *et al.*,

Plaintiff-Appellant,

v.

ACandS, INC., *et al.*,

Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

PLAINTIFFS/APPELLANTS' MOTION FOR RECONSIDERATION OF PORTIONS OF THE APPELLATE COMMISSIONER'S ORDER GRANTING ATTORNEYS' FEES AND DOUBLE COSTS

(Filed Sep. 30, 1996)

NOW COMES ALAN KELLMAN, counsel for the Plaintiffs/Appellants, by and through **THE MARITIME ASBESTOSIS LEGAL CLINIC,** a division of **THE JAQUES ADMIRALTY LAW FIRM, P.C.,** and pursuant to

9th Cir. R. 39-1.5, hereby seeks reconsideration of the Appellate Commissioner's Order filed September 16, 1996, granting attorneys' fees and double costs pursuant to this Court's award in its Memorandum of April 19, 1996, of sanctions for filing a frivolous appeal. Since the Commissioner's Order was mailed to Plaintiff's counsel on September 16, 1996, under Fed. R. App. P. 26(c), this motion for reconsideration is timely. In support, Plaintiffs/Appellants rely on the attached brief.

DATED at Detroit, Michigan this 27th day of September, 1996.

RESPECTFULLY SUBMITTED,

THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 94-55624 & 94-55677

Before: Peter L. Shaw, Appellate Commissioner

NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

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Defendants-Appellees.

No. 94-55624
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v.

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Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

PLAINTIFFS/APPELLANTS' BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF PORTIONS OF THE APPELLATE COMMISSIONER'S ORDER GRANTING ATTORNEYS' FEES AND DOUBLE COSTS

In support of their Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs, Plaintiffs/Appellants take the following exceptions:

(1) In the Appellate Commissioner's Order, an award of attorneys' fees and costs is made to Defendants/Appellees Anchor Packing Co. and Coltec Industries, Inc. despite the fact that their Application for Attorney Fees and Sanctions was inexplicably not properly served on Plaintiffs/Appellants' counsel. As set forth in Plaintiffs/Appellants' Motion to Strike Responses, Replies, and Declarations Filed by Defendants/Appellees Aurora Pump, Inc., The Mortell Company, Quaker Construction Products, Inc., Fel-Pro Incorporated and Felt Products Manufacturing Company, Inc., and Coltec Industries, Inc., and Anchor Packing Company to Plaintiffs/Appellants' Response and Objections to Application for Attorney's Fees and Double Costs, Plaintiffs/Appellants never received the Application for Attorney Fees and Sanctions. In support of their Motion, Plaintiffs/Appellants submitted an Affidavit of Counsel establishing that the Application was not received by their counsel. Accordingly, Plaintiffs/Appellants take exception with the Appellate Commissioner's ruling that these defendants are entitled to attorneys' fees and costs. When Plaintiffs/Appellants did not receive the Application for Attorney Fees and Sanctions, they were denied the opportunity to object to the Application. Under these circumstances, the Appellate Commissioner should have either stricken the Application by Coltec Industries and Anchor Packing, which was not properly served on Plaintiffs/Appellants, or afforded Plaintiffs/Appellants an

opportunity to file objections. *Cf. DeVore v. Federal Savings Bank of Dover, N.H.*, 818 F. Supp. 432 (D. Me. 1993), *aff'd*, 14 F.3d 44 (1st Cir. 1994) (table) (motion for summary judgment ordered reserved when confusion existed over whether plaintiffs had been served).

(2) The Appellate Commissioner awarded attorneys' fees and costs pursuant to this Court's award of sanctions for a frivolous appeal to two Defendants/Appellees who did not file an appearance in these consolidated appeals. Order at 14. One of these Defendants/Appellees, Home Rubber Co., sought only attorneys' fees. The other, Indian Head Industries, asked for both attorneys' fees and double costs. Plaintiffs/Appellants take exception with the Appellate Commissioner's award to these parties. Under Fed. R. App. P. 38, when a court determines that an appeal is frivolous, "it may . . . award *just* damages and single or double costs." Case law has also established that an award of sanctions for needless costs should not be made. *Brooks v. Allison Div., General Motors Corp.*, 874 F.2d 489 (7th Cir. 1989). Where a party has never filed anything in an appellate proceeding, including a simple appearance form, it has done no work in the appellate court. A sanctions award to such a party allows them to reap where they have not sown, in derogation of the Rule 38 mandate that claimed damages and costs be just.

(3) In his Order, the Appellate Commissioner awarded attorneys' fees to Defendant/Appellee Warren Pumps, Inc. However, the Order misstates one basis for Plaintiffs/Appellants' Objections to Warren Pumps' Application for Attorneys Fees. The Commissioner recites that Plaintiffs' counsel objected to "an excessive hourly

fee." Order at 22. In fact, Plaintiffs' counsel objected to the claimed attorneys' fees because Warren Pump's counsel utilized a uniform rate of $165.00 per hour for all attorneys in its office. *See* Exhibit D to Plaintiffs/Appellants' Response and Objections. As discussed in James W. Moore, *Moore's Federal Practice* ¶ 54.79[1] (1996), the determination of a reasonable attorneys' fee is in part based upon the appropriate hourly rate. Such an appropriate hourly rate is reached by determining either the historic rate for each individual attorney or the community rate for a lawyer with the same level of experience, reputation, and skill. *Id.* at ¶ 54.79[1-2]. Individual assessment of each attorney's hourly rate is warranted under Supreme Court precedent. As noted by the Supreme Court,

> We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively – even within a law firm.

Blum v. Stenson, 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 1547 n. 11, 79 L. Ed. 2d 891 (1984).

The use of a uniform hourly rate for all attorneys in a law firm undercuts the Court's ability to determine the reasonableness of the attorneys' fees that are sought, and it assumes the attorneys of varied skill levels are equal when they are not. Thus, the seminal case of *In re Fine*

Paper Antitrust Litigation, 751 F.2d 562 (11th Cir. 1984), required *individual* determinations of reasonable billing rates. *Id.* at 590-91. Plaintiffs/Appellants except to the Appellate Commissioner's Order inasmuch as it awards attorneys' fees to Defendant/Appellee Warren Pumps based on a uniform hourly rate for all attorneys in the law firm providing representation.

(4) Plaintiffs/Appellants except to the Appellate Commissioner's award of attorneys' fees even though most of the Applications for Attorneys' Fees submitted do not contain detailed itemization of the fees requested. This argument was raised before the Appellate Commissioner, *see* Exhibit D to Plaintiffs/Appellants' Response and Objections. Plaintiffs/Appellants reiterate that, in the absence of a properly detailed application for attorneys' fees or billing records, it is impossible for Plaintiffs/Appellants' counsel to make any adequate determination of whether the charges asserted by the various Defendants/Appellees are excessive, duplicative, or reflect overstaffing. For example, in Warren Pump's Application for Attorneys Fees, the hours claimed for preparing the appellate briefs include everything from the reviewing of Plaintiffs/Appellants' Opening Brief and legal research down to compiling the Record Excerpts. No allocation of hours is given to each activity, making it impossible for Plaintiffs/Appellants to determine whether a reasonable amount of time was spent on each activity. And, in Aurora Pump's Application for Attorneys' Fees, the supporting Declaration only recites that a certain number of attorney hours were spent without giving any detail as to what those hours were spent doing. With this paucity of detail, the reasonableness of the fees claimed cannot be

meaningfully determined. These Applications do not reflect the sort of "billing sense" that an attorney uses when dealing with a private client, as they must under Supreme Court precedent. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40 (1983). Because there are similar problems with the Applications for Attorneys' Fees submitted by certain other Defendants/Appellees, as set forth in Exhibit D to Plaintiffs/Appellants' Response and Objections, Plaintiffs/Appellants except to the Appellate Commissioner's Order on this ground as well.

For the reasons set forth above, Plaintiffs/Appellants ask that this Court reconsider those portions of the Appellate Commissioner's Order to which they have noted exceptions.

DATED at Detroit, Michigan this 27th day of September, 1996.

RESPECTFULLY SUBMITTED,

THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.

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NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

ACandS, INC., *et al.*,

Defendants-Appellees.

No. 94-55624
D.C. No.
CV-93-01120-JSR

CREIGHTON E. MILLER,
Administrator of the Estate of
ISAAC W. ABRAHAM, SR., *et al.*,

Plaintiff-Appellant,

v.

ACandS, INC., *et al.*,

Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

CERTIFICATE OF SERVICE

I certify that on September 27, 1996 I served a copy of *Plaintiffs/Appellants' Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs* by regular U.S. mail to each of the counsel of record on the attached sheet.

/s/ Michael Skinner
Michael Skinner

Subscribed and sworn to before
me this 27th day of September, 1996.

/s/ Lynn Rademacher
Notary Public

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiffs/Appellants, vs. ACandS, INC., et al., Defendants/Appellees.	No. 94-55624 DC# CV-93-1120-JSR Southern California
CREIGHTON S. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiffs/Appellants, vs. ACandS, INC., et al., Defendants/Appellees.	No. 94-55677 DC# CV-93-1119-JSR Southern California ORDER (Filed Sep. 16, 1996)

Before: Peter L. Shaw, Appellate Commissioner

The Court awarded to all defendants sanctions against plaintiffs' counsel in the form of attorneys' fees and double costs for filing frivolous appeals. The court directed the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant. The Appellate Commissioner issued an order directing defendants to submit applications for attorneys' fees and double costs.

Many defendants submitted applications for fees and double costs. Plaintiffs' counsel filed a response and

opposition. Several defendants filed replies to the opposition.[1] The Appellate Commissioner has reviewed the filings and makes the following factual and legal determinations.

I

General Findings

A. Principles Governing Award of Attorneys' Fees

Defendants are entitled to reasonable attorneys' fees for defending against this appeal. A reasonable fee is calculated by determining the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). The reasonableness determination results from applying the criteria identified in *Hensley*, which include the time and labor required, the novelty and difficulty of the questions, the skill needed to perform the legal service properly, the amount involved, and the results obtained. *Id.* at 430 n.3. Any hours that are excessive should be excluded. *Id.* at 434. The rate to be used is the prevailing market rate charged for similar services by lawyers of reasonably comparable skill, experience, and

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[1] Plaintiffs' counsel has moved to strike the replies on the grounds that neither the Federal Rules of Appellate Procedure nor the Ninth Circuit Rules envision the filing of replies, and that the replies are untimely because they were filed more than seven days after the opposition. The Appellate Commissioner declines to rule on the motion to strike because nothing in any of the reply briefs has influenced the award of fees or costs.

reputation. *See Blum v. Stenson*, 465 U.S. 886, 895-96 & n.11 (1984).

Plaintiffs' counsel makes a number of general objections to the defendants' claims. Plaintiffs' counsel objects to excessive hours, lack of specific itemization of hours, and excessive hourly rates charged. Plaintiffs' counsel also objects to fees claimed for services by paralegals and law clerks.

Plaintiffs' counsel asserts that several parties claim excessive fees in light of the fact that they filed no brief or, in some cases, filed only a motion for joinder. Although the nature of the documents filed by a party is relevant in assessing the reasonableness of the number of hours claims, a fee request is not necessarily excessive merely because a party filed no documents. In a multi-party case, even a party that does not file its own brief may reasonably need to stay informed about the case, coordinate the briefing effort with other parties, and determine whether to file a notice of joinder. Where that is the case, reasonable fees will be awarded.

Plaintiffs' counsel repeatedly objects to defendants' failure to supply a more detailed itemization of fees requested. Where a claimant fails to show the hours, rate per hour, and type of work performed, the court may, of course, reduce the fee request. Except as otherwise noted below, however, the defendants supported the fee requests with sufficient detail to permit an informed determination whether the amounts claimed are reasonable.

Plaintiffs' counsel objects to fees claimed in preparing the fee application. This objection has merit. Costs

and fees incurred in computing the appropriate amount of sanctions are not recoverable. *See Lyddon v. Geothermal Properties, Inc.*, 996 F.2d 212, 214 (9th Cir. 1993).

Plaintiffs' counsel objects to the request for fees for paralegals and law clerks. This objection lacks merit and reasonable time claimed will be awarded. *See Missouri v. Jenkins*, 491 U.S. 274, 286 (1989).

The hourly rate claimed by defendants will be awarded if the defendants show that an attorney's experience, usual and customary rate, or the prevailing charges for similar work in that area justifies that rate. *See Blum v. Stenson*, 465 U.S. at 895 & n.11. Where no such justification is shown, the rate will be adjusted.

B. Costs

Defendants' request for costs is governed by Ninth Circuit Rule 39-1.2, which provides that "costs will be allowed for 18 copies of each brief plus 2 copies for each party to be served [and] . . . six copies of the excerpts of record plus 1 copy for each party to be served."

Plaintiffs' counsel suggests that several briefs could have been consolidated and objects to the additional copying charges associated with the additional briefs. Plaintiffs' counsel also objects to charges for postage, express mail, long distance phone calls, mileage, excessive copy rates, excessive numbers of briefs, and duplication of excerpts of record.

The defendants were not obligated to file consolidated briefs, and therefore all defendants who filed briefs are entitled to copying costs. The assertion that copies

should be determined by the number of attorneys – as opposed to the number of parties – ignores the explicit language of Ninth Circuit Rule 39-1.2. All parties were entitled to receive copies of briefs, and plaintiffs' counsel has advanced no justification for shifting the burden of copying to the receiving attorneys.

Charges for postage, express mail, phone calls, mileage, and copy charges exceeding 20 cents per page are not authorized by Ninth Circuit Rule 39-1 and cannot be awarded.

C. Parties Entitled to Fees and Costs

Plaintiffs' counsel asserts that parties not listed on the Ninth Circuit's docket have no right to collect fees and costs.[2] This assertion lacks merit. First, some of the parties listed by plaintiffs' counsel *are* on the court's docket sheet. Second, all of these parties are listed on the district court docket sheet, and the court has not issued any orders removing any of the parties. Third, these parties are listed on plaintiffs' counsel's proof of service list, which demonstrates that plaintiffs' counsel believed them to be parties to the appeal. Finally, this court awarded fees and double costs to all "defendants," and

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[2] Specifically, plaintiffs' counsel objects to any award to: Argo International Corp., Auburn Mfg. Co., Gatke Corp., Home Rubber Co., Indian Head Indus., Inc., James Walker Mfg. Co., Norton Co., The Okonite Co., Pecora Chemical Corp., Phoenix Specialty Mfg. Co., Plibrico Co., Quaker Construction Products Co., Resco Products, Inc., Rhopac Inc., Vellumoid Inc., Viking Pump, Inc., Sherwin-Williams Co., and Zimmerman Packing & Mfg. Co.

defendants in the district court action had a legitimate right to defend the judgment; a favorable outcome for plaintiffs' counsel in this court could have affected all defendants in the district court.

D. Fee Requests by Attorney J. Lawrence Judy

Attorney J. Lawrence Judy submitted separate fee applications on behalf of himself and colleagues for the following defendants: Alfred Conhagen, Inc., Coffin Pump, Inc., Elliot Company, Excelsior, Inc., Greene Tweed Company, Norton Company, Plibrico Company, Sherwin-Williams Company, Vellumoid, Inc., and Viking Pump, Inc. The total fee request is $21,944.50.

Plaintiffs' counsel objects to the lack of detail in these declarations, and suggests that counsel Judy may have billed several clients for the same work, but offers no evidence to support this conjecture. Therefore, to the extent that plaintiffs' counsel requests this court to apply a higher standard for determining the accuracy of hours claimed by attorney Judy, the request is rejected.

Nevertheless, the cumulative claimed fees for attorney Judy's work appears excessive. None of the defendants he represented filed any independent substantive documents with the court, the work was not complex, and significant efficiencies should have been achieved in representing so many clients with identical or similar issues. Therefore, the claims for attorneys fees submitted by attorney Judy have been reduced by half. All claimed costs are justified, however, and are awarded in full.

E. Contributions to Arent & Fox

The law firm of Arent & Fox represented Fel-Pro, Inc. and also prepared certain primary documents with which many other codefendants joined. As part of a joint defense strategy, 17 codefendants each contributed $500.00 to Arent & Fox, which reasonably allocated half to costs and half to fees.

Each of the 17 contributing codefendants is entitled to double costs. Thus, those codefendants will receive a total of $8,500.00. Fel-Pro reports actual costs of only $4,005.60, however, and is entitled to double costs of only $8,011.20. Thus, the award to Fel-Pro shall be reduced by the $488.80 overcharge.

Fel-Pro claims attorney fees of $70,071.81. Its application requests $65,821.81, which reflects the deduction of the $4,250.00 contributed by codefendants. The impact of these findings on the fees awarded to Fel-Pro, Inc. are discussed in greater detail in the appropriate section of part II.

II

Specific Awards

ACandS, Inc., et al.

These defendants filed two nearly identical 8-page briefs and 47-page supplemental excerpts of record. They request $44,450.50 in fees and double costs in the amount of $3,278.72 for copying costs. Plaintiffs' counsel objects to excessive hours and lack of itemization. A careful review of the fees requested reveals that the amounts

claimed are excessive. The questions addressed are not difficult, and the work produced does not justify the amount of time spent. Therefore, fees are awarded in the reduced amount of $15,000.00. Double costs in the amount of $3,278.72 are awarded in full.

Alfred Conhagen, Inc.

This defendant did not file any independent substantive documents with the court, and requests $1,200.00 in fees. Plaintiffs' counsel objects to the lack of a fee itemization and possibly duplicative fees. The court finds the fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $600.00 are awarded.

Anchor Packing Co. & Coltec Indus.

These defendants did not file any independent substantive documents with the court, and request $6,192.50 for fees and $1,000.00 for double costs, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel incorrectly asserts that these defendants did not submit a motion for fees and double costs, and also objects to excessive hours. The hours claimed are not justified by the need to keep informed about the appeal and coordinate with other parties. Accordingly, fees are reduced to $4,192.50. Double costs in the amount of $500.00 are awarded.

Aurora Pump Division of General Signal Corp.

This defendant did not file any independent substantive documents with the court, and requests $3,882.24 in fees and double costs in the amount of $423.24. Plaintiffs' counsel objects to excessive attorney's fees and lack of itemization. The fee application is sufficiently detailed, however, and the amount claimed is reasonable. Fees are awarded in the amount of $3,882.24. The defendant failed to separate nonreimbursable costs for postage and phone calls from allowable copy costs. Therefore, costs are reduced by half and $211.62 is awarded.

B.F. Goodrich

This defendant did not file any independent substantive documents with the court, and requests $20,515.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of specific itemization of hours, mathematical errors, and paralegal time claimed for preparation of application for fees. As discussed in the General Findings, fees claimed for the preparation of the fee application are not recoverable. Therefore, the fee request is reduced by $1,265.50. Furthermore, the hours claimed are excessive and fees are reduced by half after deducting the above amount. Defendant is awarded $4,625.00 in fees and $500.00 in double costs.

Champion International

This defendant did not file any independent substantive documents with the court, and requests $1,690.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the $240.00 per hour fee rate as excessive. Because the defendant fails to demonstrate the reasonableness of the fee rate, fees are reduced by $40 per hour and are awarded in the amount of $1,450.00. costs of $500.00 are also awarded.

Coffin Turbo Pump, Inc.

This defendant did not file any independent substantive documents with the court, and requests $12,497.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours and possibly duplicative fees. The hours spent are excessive and the fee request is reduced by half to $6,248.75. Additionally, in accordance with part D of the General Findings, that portion of fees attributed to attorney Judy ($4,287.50) is reduced by half again. Fees in the amount of $5,177.00 are awarded. Double costs of $500.00 are also awarded.

Durabla Manufacturing Co.

This defendant filed a 2-page motion for joinder, and requests $514.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and

$250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to a lack of itemization. The fee request is, however, sufficiently detailed and fees are awarded in the amount of $514.00. Double costs of $500.00 are also awarded.

Elliot Co.

This defendant did not file any independent substantive documents with the court, and requests $475.00 in fees. Plaintiffs' counsel objects to a lack of fee itemization and possibly duplicative fees. The fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $237.50 are awarded.

Everlasting Valve Co.

This defendant did not file any independent substantive documents with the court, and requests $3,045.00 in fees and double costs in the amount of $266.48. Plaintiffs' counsel objects to excessive hours, lack of itemization, and costs for express mail and mileage. The fee request is sufficiently detailed and justified to keep abreast of the case. Fees in the amount of $3,045.00 are awarded. All costs are denied as noncompensable. *See* 9th Cir. R. 39-1.2.

Excelsior Inc.

This defendant did not file any independent substantive documents with the court, and requests $1,612.50 in

fees. Plaintiffs' counsel objects to excessive hours. The fee request is reduced by half in accordance with part D of the General Findings. Fees in the amount of $806.25 are awarded.

Fel-Pro Inc. & Felt Products Mfg. Co.

These defendants filed a 35-page brief, a 77-page supplemental excerpts of record, and a motion to dismiss the appeal. They request $65,821.81 in fees and double costs in the amount of $3,761.20. Plaintiffs' counsel objects to excessive hours, lack of itemization, excessive hourly fee, incorporation of computer research time into fees, and failure to fully deduct contributions from other defendants.

As discussed in part E of the General Findings, the cost claimed by Arent & Fox have been paid by the codefendants and no costs will be awarded to Fel-Pro, Inc. Furthermore, the double costs overcharge of $488.80 will be deducted from the award to Fel-Pro, Inc.

The maximum claimed attorney fee of $200.00 per hour is not excessive and no adjustment will be made.

It is reasonable to assume that the amount of time an attorney saves using a computer research service more than compensates for the costs of that service. To disallow computer research costs would encourage attorneys to use a less efficient manual method of research. Therefore, computer research costs in the amount of $2,551.56 are awarded as part of compensable attorneys' fees. *See Lyddon*, 996 F.2d at 215. *Accord Harman v. Lyphomed, Inc.*, 945 F.2d 969, 976 (7th Cir. 1991).

A careful review of the total fees requested reveals that the amounts claimed are excessive. Although Arent & Fox played an important role in coordinating the efforts of many defendants, the legal issues are not complex and the work produced does not justify the amount of time claimed. Therefore, after deducting the $488.80 overcharge, the remaining fee request is reduced by one-third. Accordingly, fees in the amount of $43,555.00 are awarded and no further costs are awarded.

Flintkote Co.

On May 21, 1996 this defendant filed a motion to withdraw its application for fees. The motion is granted and no fees or costs are awarded.

General Cable Co.

This defendant did not file any independent substantive documents with the court, and contributed $250.00 for fees and $250.00 for costs to Arent & Fox. Fees in the amount of $250.00 and costs in the amount of $500.00 are awarded.

Goodyear Tire & Rubber Co.

This defendant did not file any independent substantive documents with the court, and requests $1,087.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of

itemization of hours and an excessive number of hours. The fee request is sufficiently detailed and the number of hours claimed is justified to keep abreast of the case. Fees in the amount of $1,087.50 are awarded. Costs of $500.00 are also awarded.

Greene Tweed Co.

This defendant did not file any independent substantive documents with the court, and requests $737.50 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of itemization of hours and possibly duplicative fees. The fee request is sufficiently detailed, however, and the $250.00 paid to Arent & Fox is awarded in full. But the remaining fees attributed to attorney Judy ($487.50) are reduced by half in accordance with part D of the General Findings. Fees in the amount of $493.75 and double costs in the amount of $500.00 are awarded.

The Home Rubber Co.

This defendant did not file any independent substantive documents with the court, and requests $844.50 in fees. Plaintiffs' counsel objects to this request because Home Rubber did not file an appearance, the application lacks a specific itemization of hours, and the application seeks fees for preparing the attorney's fees claim. The fee request is sufficiently detailed and the number of hours spent appears justified to keep abreast of the case. As discussed in the General Findings, however, the time

spent on preparing the fee application is not recoverable and has been deducted. Fees in the amount of $672.00 are awarded.

Indian Head Industries, Inc.

This defendant did not file any independent substantive documents with the court, and requests $628.00 in fees and double costs in the amount of $752.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to a request from a party that did not file an appearance, lack of itemization of hours, and mathematical errors.

The fee request is sufficiently detailed and is justified in order to keep abreast of the case. Fees in the amount of $628.00 are awarded. Part of the requested double costs is for copies made at the rate of 25 cents per page. This amount is reduced to reflect a copy rate of 20 cents per page and costs are awarded in the amount of $701.60.

Ingersoll-Dresser Pump Company

This defendant did not file any independent substantive documents with the court, and requests $1,650.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of itemization of hours, and doubling of attorney's fees. The requested fees apparently do include a doubling of the $250.00 contributed to Arent & Fox, and the request is therefore reduced by $250.00. The remaining fee request is sufficiently detailed and the hours are

justified to keep abreast of the case. Therefore, fees in the amount of $1,400.00 and double costs in the amount of $500.00 are awarded.

James Walker Mfg. Co.

This defendant did not file any independent substantive documents with the court, and requests $1,413.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of itemization of hours, and paralegal charges. The fee request is sufficiently detailed and the hours claimed are justified in order to keep abreast of the case. Fees in the amount of $1,413.00 and double costs in the amount of $500.00 are awarded.

Mortell Co.

This defendant filed motions for joinder in each appeal, and requests $1,188.50 in fees and double costs in the amount of $832.00. Plaintiffs' counsel objects to a lack of itemization of hours, excessive hours, and an excessive number of copies.

The fee request is sufficiently detailed and reflects a reasonable amount of time to stay abreast of the case. Therefore, fees in the amount of $1,188.50 and double costs in the amount of $832.00 are awarded.

Norton Co.

This defendant did not file any independent substantive documents with the court, and requests $922.00 in

fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of itemization of hours, and possibly duplicative fees. The fee request is sufficiently detailed and the $250.00 paid to Arent & Fox is awarded in full, but the remaining fees, attributed to attorney Judy ($672.00), are reduced by half in accordance with part D of the General Findings. Fees in the amount of $586.00 and double costs in the amount of $500.00 are awarded.

The Okonite Co.

This defendant did not file any independent substantive documents with the court, and requests $628.00 in fees and double costs in the amount of $752.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to the lack of itemization of hours and mathematical errors. The fee request is sufficiently detailed and justified in order to keep abreast of the case. The court therefore awards fees in the amount of $628.00. Part of the requested double costs is for copies made at the rate of 25 cents per page. This amount is reduced to reflect a copy rate of 20 cents per page, and double costs are awarded in the amount of $701.60.

Owens-Corning Fiberglass Corp.

This defendant filed a 1-page motion for joinder, and requests $1,260.00 in fees and double costs in the amount

of $197.28. Plaintiffs' counsel objects to a lack of itemization of hours, excessive hours, and failure to break down costs or use a Ninth Circuit bill of costs form. The defendant's application provides almost no detail about fees and an incomplete itemization of costs, including an unknown amount of non-allowable charges for postage. Therefore, fees and double costs are reduced by half. Appellee is awarded $630.00 in fees and $98.64 in costs.

Owens-Illinois, Inc.

This defendant filed a 19-page brief and two supplemental excerpts of record totaling 332 pages, and requests $13,043.67 in fees and double costs in the amount of $4,164.80 for copying costs. Plaintiffs' counsel objects to an excessive hourly rate, lack of itemization, excessive hours and fees for paralegals and legal assistants, and an excessive number of copies. A careful review of the fees requested reveals that the amounts claimed are justified. Therefore, fees in the amount of $13,043.67 and double costs in the amount of $4,164.80 are awarded in full.

PPG Indus., Inc.

This defendant filed a 1-page motion for joinder, and requests $3,540.00 in fees and double costs in the amount of $1,845.98. Plaintiffs' counsel objects to the lack of itemization of hours, excessive hours, misallocation of fees contributed to Arent & Fox, lack of itemization for costs, and an unknown charge for postage.

The defendant should have allocated half of the $500.00 contributed to Arent & Fox as costs and half as

fees. However, defendant treated the entire amount as costs. Therefore, the fee request is amended to include $250.00 for Arent & Fox and the request for double costs is reduced by $500.00.

The fee request is sufficiently detailed and reflects a reasonable amount of time to stay abreast of the case. Therefore, fees of $3,790.00 are awarded. Appellee provides no detail for costs. Therefore, costs are reduced by half and costs in the amount of $672.99 are awarded.

Pittsburgh Corning Corp.

This defendant filed a 2-page motion for joinder, and requests fees in the amount of $12,225.00 and double costs in the amount of $438.40. Plaintiffs' counsel objects to a lack of itemization of hours, excessive hours, charges for paralegals, and failure to break down costs or use a Ninth Circuit bill of costs form.

The defendant's declaration in support of attorney's fees is inadequate and the amount claimed is excessive. Accordingly, fees are reduced to $4,000.00. Appellee failed a bill of costs form on April 30, 1996 that adequately explains copy costs. Double costs in the amount of $438.40 are therefore awarded.

Plibrico Co.

This defendant did not file any independent substantive documents with the court, and requests $1,362.50 in fees. Plaintiffs' counsel object to the lack of itemization of

hours and possibly duplicative fees. The request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $681.25 are awarded.

Quaker Construction Products Co.

The California office representing this defendant did not file any independent substantive documents with the court, and requests $1,778.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, doubling of attorneys fees paid to Arent & Fox, lack of itemization of hours, and fees for paralegals.

This defendant miscalculated the fees; the correct total should be $1,528.00. The remaining fee request is sufficiently detailed and is justified to keep abreast of the case. Fees in the amount of $1,528.00 and double costs in the amount of $500.00 are awarded.

The Detroit office representing this defendant also did not file any independent substantive documents with the court, and requests $693.00 for attorney's fees and $17.40 for double costs. Plaintiffs' counsel objects to an excessive hourly fee, lack of itemization of hours, and charges for express mail. The court finds the fee request is sufficiently detailed. However, the hourly rate of $210.00 is reduced to $200.00 Therefore, fees are awarded in the amount of $662.00. The costs – for air express charges – are nonreimbursable and are denied.

Sherwin-Williams Co.

This defendant did not file any independent substantive documents with the court, and requests $2,125.00 in fees and double costs in the amount of $500.00, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, possibly duplicative fees, and lack of itemization of hours. The fee request is sufficiently detailed and not excessive and the $250.00 paid to Arent & Fox is awarded in full. But the remaining fees, attributed to attorney Judy ($1,875.00), are reduced by half in accordance with part D of the General Findings. Therefore, fees in the amount of $1,187.50 and double costs in the amount of $500.00 are awarded.

USX Corp.

This defendant did not file any independent substantive documents with the court, and requests $5,039.51 in fees and double costs in the amount of $572.22, including the contribution of $250.00 for fees and $250.00 for costs to Arent & Fox. Plaintiffs' counsel objects to excessive hours, lack of itemization of hours, inclusion of costs for the preparation of the fee application, and failure to itemize copy and postage costs.

As discussed in the General Findings, fees claimed for the preparation of the fee application are not recoverable. Therefore, the fee request is reduced by $843.75. The remainder of the fee request is sufficiently detailed and not excessive. Therefore, fees in the amount of $4,195.76 are awarded.

It is impossible to tell from appellee's bill of costs what portion of the amount above that paid to Arent & Fox is for allowable copy costs and what amount is for non-allowable postage. Therefore, that amount above the $250.00 paid to Arent & Fox is reduced by half. Double costs in the amount of $536.11 is awarded.

Vellumoid, Inc.

This defendant did not file any independent substantive documents with the court, and requests fees in the amount of $437.50. Plaintiffs' counsel objects to the lack of itemization of hours and possibly duplicative fees. The fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $218.75 are awarded.

Viking Pump, Inc.

This defendant did not file any independent substantive documents with the court, and requests fees in the amount of $575.00. Plaintiffs' counsel objects to the lack of itemization of hours and possibly duplicative fees. The fee request is sufficiently detailed, but is reduced by half in accordance with part D of the General Findings. Fees in the amount of $287.50 are awarded.

Warren Pumps, Inc.

This defendant filed a 17-page brief and a 108-page supplemental excerpts of record, and requests $11,991.50 in fees and double costs in the amount of $6,640.80.

Plaintiffs' counsel objects to excessive hours, lack of itemization, and an excessive hourly fee. The amount of detail is sufficient and the hours requested and hourly fee are justified. Therefore, the court awards attorney's fees in the amount of $11,991.50 and double costs in the amount of $6,640.80.

III

Conclusion

In accordance with the foregoing determinations, it is hereby ordered that plaintiffs' counsel shall pay to defendants the following amounts:

Party	Fees	Doubled Costs	Total
ACandS, Inc., et al.	$15,000.00	$ 3,278.72	$18,278.72
Alfred Conhagen, Inc.	600.00	0.00	600.00
Anchor Packing & Coltec	4,192.50	500.00	4,692.00
Aurora Pump	3,882.24	211.62	4,093.86
B.F. Goodrich	4,625.00	500.00	5,125.00
Champion International	1,450.00	500.00	1,950.00
Coffin Turbo Pump, Inc.	5,177.00	500.00	5,677.00
Durabla Manufacturing	514.00	500.00	1,014.00
Elliot Co.	237.50	0.00	237.50
Everlasting Valve Co.	3,045.00	0.00	3,045.00
Excelsior Inc.	806.25	0.00	806.25
Fel-Pro Inc.	43,555.00	0.00	43,555.00
Flintkote Co.	0.00	0.00	0.00
General Cable Co.	250.00	500.00	750.00

Goodyear Tire & Rubber	1,087.50	500.00	1,587.50
Greene Tweed Co.	493.75	500.00	993.75
The Home Rubber Co.	672.00	0.00	672.00
Indian Head Industries	628.00	701.60	1,329.60
Ingersoll-Dresser	1,400.00	500.00	1,900.00
James Walker Mfg. Co.	1,413.00	500.00	1,913.00
Mortell Co.	1,188.50	832.00	2,020.50
Norton Co.	586.00	500.00	1,086.00
The Okonite Co.	628.00	701.60	1,329.60
Owens-Corning Fib. Corp.	630.00	98.64	728.64
Owens-Illinois, Inc.	13,043.67	4,164.80	17,208.47
PPG Indus., Inc.	3,790.00	672.99	4,462.99
Pittsburgh Corning	4,000.00	438.40	4,438.40
Plibrico Co.	681.25	0.00	681.25
Quaker Constr. – Cal.	1,528.00	500.00	2,028.00
Quaker Constr. – Det.	662.00	0.00	662.00
Sherwin-Williams Co.	1,187.50	500.00	1,687.50
USX Corp.	4,195.76	536.11	4,731.87
Vellumoid, Inc.	218.75	0.00	218.75
Viking Pump, Inc.	287.50	0.00	287.50
Warren Pump, Inc.	11,991.50	6,640.00	18,631.50

/s/ Peter L. Shaw
General Orders 1.8, 6.3(e)

EXHIBIT B PAGE 1 OF 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiffs/Appellants, vs. ACANDS, INC., et al., Defendants/Appellees.	No. 94-55624 DC# CV-93-1120-JSR Southern California ORDER (Filed Apr. 19, 1996)

Before: Peter L. Shaw, Appellate Commissioner

Within 30 days of this order, defendants shall submit applications for attorneys fees and double costs to be awarded as sanctions against plaintiffs' attorney pursuant to the terms of this court's April 16, 1996 memorandum disposition. *See* 9th Cir. R. 39-1.6. Each application shall state with particularity the claimed amounts and reasons therefore. *See* Fed. R. App. P. 39. Within 45 days of the date of this order, plaintiffs' attorney may file a response to defendants' submissions.

/s/ Peter L. Shaw
General Order 6.3(e)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CREIGHTON MILLER, Administrator for the Estates of Isaac W. Abraham, et al. Plaintiff, v. AC and S, Inc., et al., Defendants.	CIVIL NOS. 93-1119(R) (RCM) & 93-1120(R) (RCM) ORDER GRANTING MOTIONS TO DISMISS
NORMAN ABAR, et al., Plaintiffs, v. AC and S Inc., et al., Defendants.	(Filed Jan. 18, 1994)

The instant actions are before me on several Defendants' motions to dismiss. For the reasons given below, I am dismissing these Complaints, as to all Defendants.[1]

I. Facts

The present Complaints are virtually identical, differing only in the length of their captions: the listing of Plaintiff's decedents and Defendants in *Miller* occupies

[1] Pursuant to Southern District of California Local Rule 7.1(d)(1), I find this motion suitable for decision without oral argument.

some eight and a half pages, and the listing of Plaintiffs and Defendants in *Abar* occupies some twenty one and a half pages.

In *Miller*, an administrator for the estates of 370 decedents brought suit against 93 Defendants. In the second complaint, Abar is the first of 994 named Plaintiffs suing the same 93 Defendants named in *Miller*.

The allegations, such as they are, take a scant four and a half pages for each case.

It is alleged that jurisdiction arises by virtue of the claims being admiralty and maritime claims. Initially, diversity of citizenship was also claimed. With the one exception of the citizenship of the administrator in *Miller*, however, the citizenship of the parties did not appear anywhere in the Complaints. And in their opposition to the Defendants' motions, Plaintiffs' counsel has dropped the claim that jurisdiction is based on diversity.

It is stated in the Complaints that: "Defendants . . . sold . . . asbestos-containing products . . . for placement on vessels upon which Plaintiffs or Plaintiff's decedents served during periods of time when the respective mariners as crewmen [and] were exposed to" asbestos. Apart from paragraphs alleging the legal conclusions of proximate cause, negligence, and damages, that sentence is the sum and substance of the short and plain statement of the grounds upon which the court's jurisdiction depends, as well as the short and plain statement of the claim showing that the pleaders are entitled to relief. Fed. R. Civ. P. 8(a)(1) and (2).

II. Discussion

Defendants raise various arguments in support of their motions to dismiss. I find that two are dispositive: first, as they stand, the Complaints do not meet the requirements of Fed. R. Civ. P. 20; and second, the Complaints fail to comply with Fed. R. Civ. P. 8(a).

A. Improper Joinder

Rule 20(a) of the Federal Rules of Civil Procedure provides that:

> [a]ll persons may join in one action as plaintiffs if they assert any right to relief, jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

Rule 20 thus imposes two requirements for joinder of plaintiffs: an occurrence or set of occurrences common to all plaintiffs: and a common issue of law or fact.

Rule 20 provides similar requirements for joinder of defendants:

> [a]ll persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Here the Complaints fail to allege the same transaction or occurrence or series of transaction [sic] or occurrences. "No allegation is made (for example) that the individual plaintiffs suffered exposure to products of any defendant at the same time [or] at the same place." *In the Matter of Asbestos II Consolidated Pretrial,* 1989 WL 56181 (N.D. Ill.). Indeed, time and place are not alleged at all. There is no attempt at individualization or description of particular circumstances and exposures of the individual decedents or individual Plaintiffs. Nor is there any attempt to individualize or describe the products and Defendants alleged to have been responsible. In addition, distinct claims cannot be joined under Rule 20 merely because they have common theoretical underpinnings. *Saval v. BL, Ltd.,* 710 F.2d 1027, 1031-2 (4th Cir. 1983).

It is true that Fed. R. Civ. P. 21 prohibits dismissal of a case for misjoinder. Rule 21 also states, however, that the Court may, upon its own initiative at any stage of the action, drop parties who are misjoined "on such terms as are just."

Because I find that the parties in these Complaints are improperly joined, I order all those but the first named Plaintiff – or in the case of *Miller,* all Plaintiff's decedents but the first named decedent, Isaac W. Abraham, Sr. – be dropped.[2] This Order is without prejudice to the dropped Plaintiffs – or Creighton Miller on

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[2] In support of this ruling, I note that when deciding whether parties are properly joined, "there can be no hard and fast rule, and that the approach must be a general one of *whether there are enough ultimate factual concurrences that it would be fair to the parties to require them to defend* jointly [the several claims] against them. . . . " *Eastern Fireproofing Co. v. U.S. Gypsum Co.,*

behalf of the other individual decedents – instituting suit based on the claims attempted to be set forth in the present Complaints. Any such filing must be accompanied by the appropriate filing fee, however, and must satisfy the jurisdictional, pleading, and venue requirements of federal law and the Federal Rules of Civil Procedure.

B. Failure to Comply with Fed. R. Civ. P. 8(a)

I also find that the Complaints in these matters fail to comply with Fed. R. Civ. P. 8(a), on two grounds.

First admiralty jurisdiction requires that the plaintiff show that: (1) the wrong occurred in navigable waters; and (2) the wrong bears a significant relationship to traditional maritime activity. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1949); *see also Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 969-70 (9th Cir. 1983); *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1120-21 (9th Cir. 1984); *Martinez v. Pacific Industrial Service Corp.*, 904 F.2d 521, 523 (9th Cir. 1990).

Plaintiffs are the parties seeking to invoke this Court's jurisdiction. Accordingly, plaintiffs always bear the burden of establishing subject matter jurisdiction. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (stating that "a federal court is presumed to lack jurisdiction unless the contrary affirmatively appears"). Dismissal can follow where a complaint fails

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160 F.Supp. 580, 581 (D. Mass. 1958) (emphasis added) (as quoted in Wright & Miller, *Federal Practice and Procedure: Civil 2d* 1653, at 382.)

to allege grounds for federal subject matter jurisdiction as required by Rule 8(a)(1), i.e., where the lack of jurisdiction appears from the face of the complaint. *Meliezer v. Resolution Trust Corp.*, 952 F.2d 879, 881 (5th Cir. 1992); *Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *see generally*, Schwarzer et al., *California Practice Guide: Federal Civil Procedure Before Trial*, 9:77 and 9:80, at pp. 9-14 and 9-15.

Here the Complaints are utterly devoid of specifics. They do not state that any alleged wrong occurred on navigable waters – because they do not allege a specific place for any alleged wrong at all. Similarly, the Complaints do not state that any alleged wrong bears a significant relationship to traditional maritime activity – because again they do not state what specific activities Plaintiff's decedents or Plaintiffs were engaged in when they were allegedly exposed to asbestos. The Complaints rely instead on Plaintiff's decedents' or Plaintiffs' mere status as crewmen on ships allegedly containing asbestos products. The mere status of crewman, however, does not meet either part of the test for admiralty jurisdiction.

Second and perhaps more important, the Complaints also fail to meet the threshold requirement of Fed. R. Civ. P. 8(a)(2) (pleader must set forth short and plain statement of the claim showing that the pleader is entitled to relief). No voyages are identified, for example, nor any specific products. Without facts such as these, Defendants

cannot answer or otherwise respond intelligently to the Complaints.[3]

In sum, because the Complaints on their face do not properly allege the subject matter jurisdiction of this Court, and because they do not meet the threshold requirements of Rule 8(a)(2), they are dismissed.

III. Conclusion

For the reasons given above, in *Abar* all Plaintiffs other than Norman Abar – and in *Miller*, all Plaintiff's [sic] decedents other than Isaac W. Abraham, Sr. – are dropped. In addition, the Complaints of Abar and Miller for the estate of Isaac W. Abraham, Sr. are dismissed for failure to comply with Fed. R. Civ. P. 8(a)(1) and (2). I will give Plaintiffs' counsel 21 days leave to amend.

IT IS SO ORDERED.

Date: 1/18/94

/s/ John S. Rhoades, Sr.
JOHN S. RHODES, SR.
UNITED STATES
DISTRICT JUDGE

Copies to:

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[3] I note that in their opposition, Plaintiffs' counsel attempt to remedy the defects of these Complaints. They offer general statements such as, for example, the statement that the plaintiffs "were seamen exposed to asbestos while performing traditional maritime activities."

This strategy is unavailing, however, for "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985).

Federal Rule of Appellate Procedure 38:

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON S. MILLER, Administrator of the Estate of ISAAC W. ABRAHAM, SR., et al.,	)	CASE NO. 94-55677
Plaintiffs and Appellants,	)	U.S. District Court No. 93-1119S-JSR (CM) (San Diego)
v.	)	
ACandS, Inc., et al.	)	
Defendants and Appellees.	)	

On Appeal from the United States District Court
for the Southern District of California
(Honorable John S. Rhoades, United States District Judge)

BRIEF OF DEFENDANT-APPELLEE
OWENS-ILLINOIS, INC.

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* * *

C. The District Court Exercised Its Sound Discretion In Denying Plaintiffs' Rule 60(b)(6) Motion.

In determining whether the District Court exercised its discretion in denying the Rule 60(b)(6) motion, this Court's analysis is informed by the particular requirements of the rule, which "has been used sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). A brief examination of Judge Rhoades' order shows the standards imposed by the Rule were clearly met. Additionally, Jaques' conduct regarding his use of the Rule and the filing of this appeal merits sanctions for filing a frivolous appeal.

1. Mr. Jaques Should Be Assessed Sanctions For His Conduct In This Court And The District Court.

As a preliminary matter, plaintiffs' filing of this appeal is frivolous and made in bad faith. By its terms Rule 60(b)(6) applies only to *final* judgments or orders. *See* Fed. R. Civ. Proc. 60(b) ("the court may relieve a party . . . from a final judgment order, or proceeding"); *Craig v. M/V Peacock on Complaint of Edwards*, 760 F.2d 953, 954 (9th Cir. 1985) (Rule 60(b) inapplicable to order not final and appealable). An order granting a motion to dismiss a complaint with leave to amend is certainly not final, since by the simple process of amendment, plaintiffs can continue their actions. Thus, since no final order existed, plaintiffs' Rule 60(b)(6) was improperly stated and Judge Rhoades exercised proper discretion in denying the motion.

Indeed, Owens-Illinois contends that because Judge Rhoades had no authority to rule on plaintiffs' motion, this appeal is frivolous. On that basis, this Court is without jurisdiction, except perhaps to assess attorneys' fees and costs against plaintiffs' counsel pursuant to Rule 38 of the Federal Rules of Appellate Procedure. *See Amwest Mtgg. Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991); *Operating Engineers Pension Trust v. Cecil Backhoe Service*, 795 F.2d 1501, 1508 (9th Cir. 1986); *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (appeal is considered frivolous if "the result is obvious or the appellant's arguments of error are wholly without merit."). Jaques' conduct both before this Court and in the District Court merit these sanctions. *See Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (basing Rule 38 sanctions on plaintiffs'

"filing of this and thirty-six other cases, which repeatedly raise the same claims [and] has become burdensome and costly to the litigants").

In this case, based on Leonard Jaques' repeated abuse of the federal court system, sanctions should be assessed against Jaques personally. This Court has recently upheld such an award. *Smith v. Ricks*, 94 C.D.O.S. 6130, 6134 (9th Cir. Aug. 12, 1994).

2. No Grounds Existed For Rule 60(b) Relief.

Even if Rule 60(b)(6) did apply, several points demonstrate the propriety of the District Court's decision. First, the rule warrants relief only if the movant can show "extraordinary circumstances" which are found to be "appropriate to accomplish justice." *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 864 (1988); *United States v. Sparks*, 685 F.2d 1128, 1130 (9th Cir. 1982) (citations omitted). The Ninth Circuit recently held that "[t]he rule is to be utilized *only* where extraordinary circumstances *prevented* a party from taking timely action to prevent or correct an erroneous judgment." *Alpine Land & Reservoir*, 984 F.2d at 1049. As Judge Rhoades pointed out in his opinion, plaintiffs presented no such extraordinary circumstances. Plaintiffs were given leave to amend, and declined to utilize the time allotted to retain their legal rights. Although plaintiffs contended that the applicable statutes of limitations had run, this argument is unsound: since the district court granted plaintiffs leave to *amend* their complaint, any amendment would relate back to the filing of the original complaint and there would be no

statute of limitations problem, assuming there was no such problem with the original complaint.

Plaintiffs also attempted to complicate the issue on their Rule 60(b)(6) motion by claiming that unless the cases were transferred to the United States District Court in the Northern District of Ohio, they would have lost all rights to their claims. Again, this

* * *

this action has been dismissed and plaintiffs have failed to amend their complaints. There is very simply no action to transfer.

Even if there were an action to be transferred, plaintiffs have not even begun to meet the showing required for a § 1404 transfer. *See Commodity Futures Trading Comm'n*, 611 F.2d at 279 (movant had the burden to justify by *"particular circumstances"* that the transferor forum was inappropriate (emphasis added)). Plaintiffs presented no argument, in this appeal or in the court below, which satisfied the grounds of convenience of the parties and witnesses or, indeed, the service of the interest of justice. As discussed above, plaintiffs' statute of limitations argument is specious and self-serving. With such a limited showing, this Court cannot find any abuse of discretion on Judge Rhoades' part in denying the untimely transfer request.

Finally, plaintiffs' request is a blatant instance of improper forum shopping, similar to the filing of identical suits in different federal courts, and of filing thousands of lawsuits in assorted district courts across the country. Plaintiffs have already chosen their forum, are

dissatisfied with a ruling there, and now seek transfer in the hopes of avoiding that ruling. This is an inappropriate use of § 1404, and Judge Rhoades' rejection of this effort is entirely proper and within the sound discretion of the District Court.

VI. CONCLUSION

This appeal should be dismissed for lack of appellate jurisdiction, and sanctions assessed, under Rule 38 of the Federal Rules of Appellate Procedure, against Leonard Jaques for his frivolous appeal and abuse of the federal court system. Even if this Court finds that it has jurisdiction over this appeal, the District Court's ruling denying

* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al., Plaintiff(s) and Appellant(s), v. ACandS, INC., et al. Defendants and Appellees.	)	CASE NO. 94-55624 U.S. District Court No. 93-1120R-JSR (CM) (San Diego)

On Appeal from the United States District Court
for the Southern District of California
(Honorable John S. Rhoades, United States District Judge)

BRIEF OF DEFENDANT-APPELLEE OWENS-ILLINOIS, INC.

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1. Mr. Jaques Should Be Assessed Sanctions For His Conduct In This Court And The District Court.

As a preliminary matter, plaintiffs' filing of this appeal is frivolous and made in bad faith. By its terms Rule 60(b)(6) applies only to *final* judgments or orders. *See* Fed. R. Civ. Proc. 60(b) ("the court may relieve a party . . . from a final judgment order, or proceeding"); *Craig v. M/V Peacock on Complaint of Edwards*, 760 F.2d 953, 954 (9th Cir. 1985) (Rule 60(b) inapplicable to order not final and appealable). An order granting a motion to dismiss a complaint with leave to amend is certainly not final, since by the simple process of amendment, plaintiffs can continue their actions. Thus, since no final order existed, plaintiffs' Rule 60(b)(6) was improperly stated and Judge Rhoades exercised proper discretion in denying the motion.

Indeed, Owens-Illinois contends that because Judge Rhoades had no authority to rule on plaintiffs' motion, this appeal is frivolous. On that basis, this Court is without jurisdiction, except perhaps to assess attorneys' fees and costs against plaintiffs' counsel pursuant to Rule 38 of the Federal Rules of Appellate Procedure. *See Amwest Mtgg. Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991); *Operating Engineers Pension Trust v. Cecil Backhoe Service*, 795 F.2d 1501, 1508 (9th Cir. 1986); *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (appeal is considered frivolous if "the result is obvious or the appellant's arguments of error are wholly without merit."). Jaques' conduct both before this Court and in the District Court merit these sanctions. *See Wood v. McEwen*, 644 F.2d 797, 802 (9th Cir. 1981) (basing Rule 38 sanctions on plaintiffs'

"filing of this and thirty-six other cases, which repeatedly raise the same claims [and] has become burdensome and costly to the litigants").

In this case, based on Leonard Jaques' repeated abuse of the federal court system, sanctions should be assessed against Jaques personally. This Court has recently upheld such an award. *Smith v. Ricks*, 94 C.D.O.S. 6130, 6134 (9th Cir. Aug. 12, 1994).

2. No Grounds Existed For Rule 60(b) Relief.

Even if Rule 60(b)(6) did apply, several points demonstrate the propriety of the District Court's decision. First, the rule warrants relief only if the movant can show "extraordinary circumstances" which are found to be "appropriate to accomplish justice." *Liljeberg v. Health Svcs. Acquisition Corp.*, 486 U.S. 847, 864 (1988); *United States v. Sparks*, 685 F.2d 1128, 1130 (9th Cir. 1982) (citations omitted). The Ninth Circuit recently held that "[t]he rule is to be utilized *only* where extraordinary circumstances *prevented* a party from taking timely action to prevent or correct an erroneous judgment." *Alpine Land & Reservoir*, 984 F.2d at 1049. As Judge Rhoades pointed out in his opinion, plaintiffs presented no such extraordinary circumstances. Plaintiffs were given leave to amend, and declined to utilize the time allotted to retain their legal rights. Although plaintiffs contended that the applicable statutes of limitations had run, this argument is unsound: since the district court granted plaintiffs leave to *amend* their complaint, any amendment would relate back to the filing of the original complaint and there would be no

statute of limitations problem, assuming there was no such problem with the original complaint.

Plaintiffs also attempted to complicate the issue on their Rule 60(b)(6) motion by claiming that unless the cases were transferred to the United States District Court in the Northern District of Ohio, they would have lost all rights to their claims. Again, this

* * *

Comm'n, 611 F.2d at 279 (movant had the burden to justify by *"particular circumstances"* that the transferor forum was inappropriate (emphasis added)). Plaintiffs presented no argument, in this appeal or in the court below, which satisfied the grounds of convenience of the parties and witnesses or, indeed, the service of the interest of justice. As discussed above, plaintiffs' statute of limitations argument is specious and self-serving. With such a limited showing, this Court cannot find any abuse of discretion on Judge Rhoades' part in denying the untimely transfer request.

Finally, plaintiffs' request is a blatant instance of improper forum shopping, similar to the filing of identical suits in different federal courts, and of filing thousands of lawsuits in assorted district courts across the country. Plaintiffs have already chosen their forum, are dissatisfied with a ruling there, and now seek transfer in the hopes of avoiding that ruling. This is an inappropriate use of § 1404, and Judge Rhoades' rejection of this effort is entirely proper and within the sound discretion of the District Court.

VI. CONCLUSION

This appeal should be dismissed for lack of appellate jurisdiction, and sanctions assessed, under Rule 38 of the Federal Rules of Appellate Procedure, against Leonard Jaques for his frivolous appeal and continued abuse of the federal court system. Even if this Court finds that it has jurisdiction over this appeal, the District Court's ruling denying plaintiffs' motion for relief under Rule 60(b)(6) was firmly within the District Court's sound discretion, and must be affirmed.

DATED: October 3, 1994

MORGENSTEIN & JUBELIRER

By: /s/ Bruce A. Wagman
Bruce A. Wagman
Attorneys for Defendant and Appellee Owens-Illinois, Inc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket Nos. 94-55624 & 94-55677

NORMAN D. ABAR, *et al.*,

Plaintiffs-Appellants,

v.

ACandS, INC., *et al.*,

Defendants-Appellees.

No. 94-55624
D.C. No.
CV-93-01120-JSR

CREIGHTON E. MILLER,
Administrator of the Estate of
ISAAC W. ABRAHAM, SR., *et al.*,

Plaintiff-Appellant,

v.

ACandS, INC., *et al.*,

Defendant-Appellees.

No. 94-55677
D.C. No.
CV-93-01119-JSR

MOTION TO VACATE SUMMARY IMPOSITION OF RULE 38 SANCTIONS, OR, IN THE ALTERNATIVE, FOR STATEMENT OF REASONS AND OPPORTUNITY TO RESPOND

NOW COMES ALAN KELLMAN, counsel for the Appellants, by and through **THE MARITIME ASBESTOSIS LEGAL CLINIC,** a division of **THE JAQUES ADMIRALITY LAW FIRM, P.C.,** and pursuant to Fed. R. App. P. 38 as amended April 29, 1994, respectfully moves the Court to vacate its premature and procedurally defective imposition of sanctions set forth in its Memorandum dated April 16, 1996.

In the alternative, counsel moves the Court for a statement of reasons for its conclusion that the subject appeals were frivolous, and for an opportunity to respond in writing and show cause why sanctions should not be imposed.

FACTS

By Memorandum dated April 16, 1996 (Exhibit "A"), a panel of the Court rejected the appeal and affirmed the decisions of the District Court. The final paragraph of the Memorandum (Page 6) recites in full:

> Several defendants requested sanctions under Rule 38 alleging that this appeal was frivolous. The Court agrees and all defendants are awarded sanctions against the plaintiffs' attorney for attorneys' fees and double costs. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) (sanctions need not be sought to be awarded), *cert. denied*, 474 U.S. 1021 (1985). This matter is referred to the Appellate Commissioner to determine the amount of sanctions to be awarded to each defendant.

Pursuant to the award of sanctions in the Court's Memorandum, on April 19, 1996 the Appellate Commissioner issued an Order for the defendant-appellees to submit applications for double costs and attorneys' fees within 30 days, and for plaintiffs' counsel to respond to those applications within 45 days. Exhibit "B".

The Memorandum Disposition and the Commissioner's Order were mailed together, and were received in Detroit by plaintiffs' counsel on April 23, 1996.

THE IMPOSITION OF RULE 38 SANCTIONS WAS PROCEDURALLY IMPROPER.

F.R.A.P. 38, as amended April 29, 1994, effective December 1, 1994, now provides:

> If a court of appeals determines that an appeal is frivolous, it may, ***after a separately filed motion or notice from the court and reasonable opportunity to respond,*** award just damages and single or double costs to the appellee.

(Emphasis supplied.) As the Advisory Committee Note to the 1994 amendment explains:

> The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. Requests in briefs for sanctions have become so commonplace that it

> is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is not such motion filed, notice must come from the court.

One commentator on federal procedure notes (9 *Moore's Federal Practice* ¶ 238.04 at Pages 38-20, 38-21) that promulgation of the amended Rule has settled a previous split of authority over proper procedure to be followed in imposing sanctions. The commentator goes on to state:

> What constitutes notice? A statement or request in a brief does not. Only a separately filed motion is sufficient; absent a motion, the notice must come from the court.

As a panel of this Court wrote on March 7, 1996, in denying a request for Rule 38 sanctions:

> Appellees . . . request an award of attorney fees and costs, contending the Gabors' appeal is frivolous. The appellees request these fees only in their appellate briefs and not in a separately filed motion.
>
> The 1994 amendment to Federal Rule of Appellate Procedure 38 permits an award under this rule only "after a separately filed motion or notice from the court and reasonable opportunity to respond." The advisory committee notes to this amendment state that a request for sanctions in a party's appellate brief does not provide sufficient notice to the opposing party.

Gabor v. Frazer, 78 F.3d 459 (9th Cir. 1996) (Exhibit "C").

Although the Court stated in its Memorandum that "Several defendants" had requested sanctions, counsel

has reviewed the briefs and related joinder papers filed by the Appellees and has found only **one** defendant-appellee which requested sanctions, namely Owens-Illinois. *See* Owens-Illinois' Brief in No. 94-55624 at 12-13, 19; Owens-Illinois' Brief in No. 94-55677 at 12-13, 19. **None** of the other Appellees even cited Rule 38 in their papers (*see* the several Tables of Authorities), much less asked for sanctions.

Moreover, Owens-Illinois' request for sanctions in its brief is not the requisite "separately filed motion . . . and reasonable opportunity to respond" mandated by the amended Rule 38. This Court's decision in *Gabor v. Frazer, supra,* as well as cases decided by the various federal Courts of Appeals since the 1994 amendment make it clear that the Rule means what it says. *See Nordberg, Inc. v. Telsmith, Inc.*, 1996 U.S.App.LEXIS 9472 (Fed.Cir., April 24, 1996) (Exhibit "D") (at oral argument, appellee withdrew claim that appeal was frivolous when Court "pointed out that it was substantively and procedurally deficient", noting that Fed. R. App. P. 38 requires separate motion or notice from the court and opportunity to respond); *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256, 258 (7th Cir. 1995). In *McDonough* the appellee, like Owens-Illinois herein, requested Rule 38 sanctions in her brief. The Seventh Circuit stated, "We cannot honor such a request." Noting that the amended rule requires a separate motion or notice from the court, the Court held that "Ms. McDonough's brief-borne request is not a separately filed motion." Accordingly, the Court would "defer final determination" of the sanctions issue until respondent had an opportunity to respond. 48 F.3d at 259.

This Rule is consistent with prior decisional law of this Circuit with respect to proper notice prior to imposition of attorney sanctions. In *Tom Growney Equip. v. Shelley Irrigation Dev.*, 834 F.2d 833, 836 (9th Cir. 1987), this Court stated that the requirement for notice and opportunity to be heard prior to imposition of sanctions upon an attorney ensure that

> (1) the attorneys will have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge will have time to consider the severity and propriety of the proposed sanction in light of the attornys' explanation for their conduct; and (3) the facts supporting the sanction will appear in the record, facilitating appellate review.

834 F.2d at 836.

In *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1082-83 (9th Cir. 1988), the Court overturned an award of sanctions, holding that two days notice of hearing to consider sanctions under a local court rule was insufficient. *See also Ford v. Alfaro*, 785 F.2d 835, 840 (9th Cir. 1986) (where counsel failed to file pretrial statement and failed to attend pretrial conference; sanctions imposed, it was abuse of discretion for court to impose sanctions without first giving notice of intent to do so and affording opportunity for a hearing).

Since respondent was not afforded the due process required by the rule, the Court should set aside its award of sanctions. In the alternative, at a minimum this Court must furnish the "notice from the court and reasonable

opportunity to respond" that Rule 38 mandates. Respondent notes that Ninth Circuit Rule 36-1 defines a "Memorandum" as a "written, **reasoned** disposition of a case or motion which is not intended for publication". (Emphasis supplied.) Respondent respectfully submits that the bare statement that "The Court agrees [that this appeal was frivolous]" is not adequate notice, and requests that the Court, should it decide to proceed further with this matter, issue an order to show cause detailing the basis for its Rule 38 inquiry and giving respondent at least 14 days to respond in writing.

Respondent also prays that the Court vacate its premature reference to the Appellate Commissioner. As shown by the Exhibit "B" Order, a schedule has been established for submission of fee applications and responses thereto. This effort is premature until and unless sanctions have been awarded pursuant to the Rule. *Cf.* Circuit Rule 30-2 ("Counsel will be provided notice and have an opportunity to respond ***before*** sanctions are imposed.") (Emphasis added.)

CONCLUSION

For the reasons set forth in this Motion, counsel prays that Court set aside its hasty and procedurally infirm award of sanctions. At a minimum, this Court should provide respondent with a statement of reasons and an opportunity to show cause why sanctions should not be imposed.

DATED at Detroit, Michigan this 29th day of April, 1996.

RESPECTFULLY SUBMITTED,

THE MARITIME ASBESTOSIS LEGAL CLINIC, A DIVISION OF THE JAQUES ADMIRALTY LAW FIRM, P.C.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORMAN D. ABAR; HORACE J. ABBOTT; VANCE ABEL; CLARENCE ABNER; EARL ADAMS, et al., Plaintiffs-Appellants, vs. ACandS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ACORN IRON AND SUPPLY CO.; ALLIS-CHALMERS CORPORATION; et al., Defendants-Appellees.	No. 94-55624 D.C. No. CV-93-01120-JSR
CREIGHTON E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al., Plaintiff-Appellant. vs. ACandS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ANCHOR PACKING CO.; AURORA PUMP DIVISION OF GENERAL SIGNAL CORP.; BETHLEHEM STEEL CORPORATION; BIGELOW-LIPTAK CORPORATION;	No. 94-55677 D.C. No. CV-93-01119-JSR

BRYAN STEAM CORP.; COFFIN PUMP INC.; CROWN, CORK AND SEAL CO., INC.; DANA CORP.; DONLEE TECHNOLOGIES, INC.; DURABLA MANUFACTURING CO.; EVERLASTING VALVE CO.; FEL-PRO INCORPORATED; FIBREBOARD CORPORATION; GENERAL CABLE CO.; B.F. GOODRICH; GOODYEAR TIRE & RUBBER CO.; INGERSOLL-DRESSER PUMP; JOHN CRANE INC.; MORTELL CO.; OWENS-CORNING FIBERGLAS CORP.; OWENS-ILLINOIS, INC.; USX CORPORATION; WARREN PUMPS, INC.; PITTSBURGH CORNING CORPORATION,

Defendants-Appellees.

ORDER

(Filed Jun. 7, 1996)

Before: BRUNETTI and KOZINSKI, Circuit Judges, and HAGEN,*** District Judge.

Appellants' Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond, is denied.

*** Hon. David Warner Hagen, United States District Judge for the District of Nevada, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-55624
CT/AG#: CV-93-01120-JSR

NORMAN D. ABAR; HORACE J. ABBOTT; VANCE ABEL; CLARENCE ABNER; EARL ADAMS, et al.,

Plaintiffs-Appellants

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ACORN IRON AND SUPPLY CO.; ALLIS-CHALMERS CORPORATION; et al.,

Defendants-Appellees

No. 94-55677
CT/AG#: CV-93-01119-JSR

CREIGHTON E. MILLER, Administrator for the Estate of Isaac W. Abraham, et al.,

Plaintiff-Appellant

v.

ACANDS, INC.; ACMC, fka National Gypsum Company; ACME BRICK COMPANY; ANCHOR PACKING CO.; AURORA PUMP DIVISION OF GENERAL SIGNAL CORP.; BETHELEHEM STEEL CORPORATION; BIGELOW-LIPTAK CORPORATION; BRYAN STEAM CORP.; COFFIN PUMP INC.; CROWN, CORK AND SEAL CO., INC.; DANA CORP.; DONLEE TECHNOLOGIES, INC.; DURABLA MANUFACTURING CO.; EVERLASTING VALVE CO.; FEL-PRO INCORPORATED; FIBREBOARD CORPORATION; GENERAL CABLE CO.; B.F. GOODRICH; GOODYEAR TIRE & RUBBER CO.; INGERSOLL-DRESSER PUMP; JOHN CRANE INC.; MORTELL CO.;

OWENS-CORNING FIBER GLAS CORP.; OWENS-ILLINOIS, INC.; USX CORPORATION; WARREN PUMPS, INC.; PITTSBURGH CORNING CORPORATION

Defendants-Appellees

(Filed July 8, 1996)

APPEAL FROM the United States District Court for the Southern District of California (San Diego).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 16, 1996

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

MAY 10 1996

by: /s/ Illegible
Deputy Clerk

Supreme Court, U.S.
FILED
AUG 4 1997
CLERK

No. 96-1940

In The
Supreme Court of the United States
October Term, 1996

THE JAQUES ADMIRALTY LAW FIRM,

Petitioner,

v.

FEL-PRO INCORPORATED,
FELT PRODUCTS MFG. CO., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals properly imposed sanctions pursuant to the version of Rule 38 of the Federal Rules of Appellate Procedure in effect at the time the Petitioner's sanctionable conduct and the briefing of the case occurred.

RULE 29.6 STATEMENT

This brief in opposition is filed on behalf of Fel-Pro Incorporated ("Fel-Pro") and Felt Products Mfg. Co. ("Felt Products"). Fel-Pro and Felt Products are not publicly held corporations or publicly held entities. Neither Fel-Pro nor Felt Products is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation or other publicly held entity. Fel-Pro and Felt Products are not related to or affiliated with any publicly held corporations or entities which have a direct financial interest in the outcome of this case.

PARTIES TO THE PROCEEDING

The Respondents

Fel-Pro Incorporated and
Felt Products Mfg. Co.

The Petitioner

The Jaques Admiralty Law Firm

The plaintiff-appellants:

Norman D. Abar, *et al.* and Creighton E. Miller, Administrator for the Estate of Isaac W. Abraham, *et al.*

The defendant-appellees:

AC&S, Inc.
Alfred Conhagen Inc.
The Anchor Packing Company & Coltec Industries Inc.

Aurora Pump Division of General Signal Corp.
The B.F. Goodrich Company
Champion International Corporation
Coffin Turbo Pump, Inc.
Durabla Manufacturing Company
Elliot Company
Everlasting Valve Company
Excelsior, Inc.
Fel-Pro Incorporated
Felt Products Mfg. Co.
The Flintkote Company
General Cable Corporation
The Goodyear Tire & Rubber Company
Green Tweed & Co.
The Home Rubber Company
Indian Head Industries, Inc.
Ingersoll-Dresser Pump Company
James Walker Manufacturing Company
Mortell Company
Norton Company
The Okonite Company
Owens-Corning Fiberglas Corporation
Owens-Illinois, Inc.
PPG Industries, Inc.
Pittsburgh Corning Corp.
Plibrico Co.
Quaker Construction Products, Inc.
The Sherwin-Williams Company
USX Corporation
Vellumoid Inc.
Viking Pump, Inc.
Warren Pumps Inc.

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OPINIONS BELOW

The Ninth Circuit's decision that affirmed the District Court's dismissal and imposed sanctions in *Abar v. ACandS, Inc.*, No. 94-55624 (9th Cir. Apr. 16, 1996) (hereafter "*Abar*"), and *Miller v. ACandS, Inc.*, No. 94-55677 (9th Cir. April 16, 1996) (hereafter "*Miller*"), is listed as a "table case" at 83 F.3d 426 (9th Cir. 1996). That decision is reported unofficially at 1996 WL 183752 and 1996 U.S. App. LEXIS 9900. (Pet'r App. 1-6.) The remaining orders of the Ninth Circuit and the orders of the Ninth Circuit's Appellate Commissioner are unreported. (Pet'r App. 7-8, 22-46, 78.)

The opinions of the District Court are unreported. (Resp'ts App. 10ra-17ra, 25ra-28ra; Pet'r App. 47-53.)

STATUTES AND OTHER PROVISIONS INVOLVED

Fed. R. App. P. 38 (amended 1994), as in effect at the time of Petitioner's frivolous appeal to the Ninth Circuit and Respondents' opposition thereto, provided:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Fed. R. App. P. 38 was subsequently amended in 1994 to provide:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to appellee.

Through the Chief Justice's Communication transmitting the 1994 amendment to Fed. R. App. P. 38 to Congress (Resp'ts App. 1ra-5ra), this Court ordered, in pertinent part:

> 2. That the foregoing amendments to the Federal Rules of Appellate Procedure [including that to Rule 38] shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

The actions giving rise to the Petition for Writ of Certiorari were originally filed in the District Court.

STATEMENT OF THE CASE

The *Miller* and *Abar* actions underlying this dispute were initiated in the United States District Court for the Southern District of California on July 27, 1993, pursuant to the admiralty provisions of Article III, section 2 of the Constitution, and based upon diversity of citizenship under 28 U.S.C. § 1332. The *Abar* action was filed on behalf of 994 plaintiffs against 93 defendants. More than 20 pages of the 26-page complaint were required to list the names of the 994 plaintiffs and 93 defendants. The allegations of these 994 plaintiffs were set forth in just four pages of the complaint. The *Miller* action was filed on behalf of the alleged administrator of the estates of 370 decedents against the same 93 defendants. More than eight pages of the 14-page complaint were required to list the names of the 370 plaintiffs and 93 defendants. Again, the plaintiffs'

allegations were set forth in just over four pages of the complaint.[1/]

Both complaints alleged that the defendants manufactured, sold, or supplied "harmful toxins and carcinogens including asbestos and asbestos-containing products" for use aboard vessels and asserted claims for personal injuries arising from plaintiffs' alleged exposure to "the aforestated chemicals and products." (Resp'ts App. 42ra.)

In August 1993, defendants Fel-Pro Incorporated and Felt Products Mfg. Co. (hereinafter collectively referred to as "Fel-Pro" and/or "Respondents") filed a motion to dismiss the complaints in both the *Miller* and *Abar* actions. Thereafter, several additional defendants adopted Fel-Pro's motions and supporting memoranda or filed their own motions to dismiss.[2/]

On September 9, 1993, the District Court issued Orders to Show Cause in *Miller* and *Abar*, setting a hearing at which plaintiffs' counsel, Petitioner herein, would be required to show cause why the cases should be

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[1/] Except for the names of the plaintiffs, the complaint filed in *Abar* is virtually identical to the complaint filed in *Miller*, which is included herein at Resp'ts App. 29ra-45ra.

[2/] Respondents' motions identified numerous deficiencies in plaintiffs' complaints, including: (1) the failure to establish a basis for subject matter jurisdiction over the claims asserted against the defendants; (2) the failure to establish a basis for personal jurisdiction over the defendants; (3) the failure to provide sufficient factual information to give defendants adequate notice of the claims against them and the grounds for the plaintiffs' claims; and (4) the improper joinder of 994 plaintiffs in *Abar* and 370 decedents in *Miller*.

docketed in that court.[3] (Resp'ts App. 25ra-28ra.) In its Orders, the District Court found that the complaints presented "serious questions regarding not only the jurisdiction of this Court, but whether this Court has any connection with the claims and whether there has been compliance with the Federal Rules of Civil Procedure." (Resp'ts App. 25ra, 27ra.) Following the show cause hearing, which took place on November 1, 1993, the District Court directed the plaintiffs to respond to the Show Cause Orders and the motions to dismiss filed by Respondents and other defendants.

On January 18, 1994, the District Court issued an Order which dropped the claims of all but the first-named plaintiff, Norman D. Abar, in the *Abar* case and the claims of the estates of all but the first-named decedent, Isaac W. Abraham, Sr., in the *Miller* case on the ground that they were improperly joined under Rule 20 of the Federal Rules of Civil Procedure. (Pet'r App. 47-53.) The District Court stated that its Order was without prejudice to any of the 993 dropped plaintiffs or the representatives of any of the 369 dropped decedents filing amended complaints as long as they "satisf[ied] the jurisdictional, pleading, and venue requirements of federal law and the Federal Rules of Civil Procedure." (Pet'r App. 50-51.)

The District Court then dismissed the complaints as to the first-named and remaining plaintiff in each case for failure to comply with the requirements of Fed. R. Civ. P. 8(a)(1) and 8(a)(2). The District Court concluded that the

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[3] Although the *Abar* case was initially assigned to a different judge, it was subsequently reassigned to District Judge John S. Rhoades, Sr., who already had been assigned to the *Miller* case. The *Miller* and *Abar* cases were later considered by the District Court jointly.

complaints failed to satisfy the requirements of Rule 8(a)(1) because they did not provide a factual basis for the assertion of admiralty jurisdiction. (Pet'r App. 52.) The District Court also held that the complaints failed to meet the threshold requirement of Rule 8(a)(2) that a pleader must set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[4/] (Pet'r App. 52-53.)

On January 31, 1994, the plaintiffs in both actions filed a Motion for Relief from Judgment of Dismissal, pursuant to Fed. R. Civ. P. 60(b)(6), in which they asserted that the District Court should reverse its order dismissing their claims because the statute of limitations would otherwise bar their claims against the named defendants. In their motion, the plaintiffs also requested the transfer of their dismissed claims to the U.S. District Court for the Northern District of Ohio.

On March 14, 1994, the District Court issued an Order denying plaintiffs' motion on the ground that Rule 60(b)(6) did not apply to the January 18, 1994 Dismissal Order because it was a nonappealable interlocutory order. (Resp'ts App. 10ra-17ra.) The District Court also concluded that even if Rule 60(b)(6) did apply to the January 18, 1994 Order, plaintiffs had not shown the existence of the type of "extraordinary circumstances" required under the Rule that would entitle them to the

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[4/] The January 18, 1994 Order gave first-named plaintiffs Abar and Miller 21 days' leave to amend their complaints to comply with the requirements of the Federal Rules of Civil Procedure. (Pet'r App. 53.) There is no indication in the record, however, that either plaintiff has ever filed or attempted to file an amended complaint in compliance with the District Court's Order.

relief requested.[5] (Resp'ts App. 15ra.) A month later, on April 14, 1994 in *Miller* and April 15, 1994 in *Abar*, Petitioner filed with the Ninth Circuit Notices of Appeal from the District Court's Order denying the Motion for Relief from Judgment.

Plaintiffs filed their appellate briefs with the Ninth Circuit on September 1, 1994,[6] and Fel-Pro filed its opposition briefs on September 28, 1994. Defendant-appellee Owens-Illinois, Inc. filed separate opposition briefs which contained a request for sanctions on October 3, 1994. (Pet'r App. 55, 62.) Plaintiffs' reply briefs, filed on November 1, 1994, did not address the issue of sanctions. In the appeal, plaintiffs contended that the District Court erred in dismissing the complaints and in refusing to transfer the dismissed actions to the U.S. District Court for the Northern District of Ohio.

By Memorandum of April 16, 1996, the Ninth Circuit Court of Appeals upheld the District Court's decision and, in the process, found plaintiffs' appeal to be "frivolous." (Pet'r App. 6.) In so finding, the Ninth Circuit noted that motions for relief under Rule 60(b) are reviewed for abuse of discretion only; the underlying judgment is not subject to review. (Pet'r App. 4.) Plaintiffs' appeal merely repeated their legal arguments

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[5] The District Court also denied plaintiffs' transfer request on the grounds that there were no causes of action to transfer since the complaints had been dismissed and because the plaintiffs had failed to establish a basis for transfer under 28 U.S.C. § 1404(a). (Resp'ts App. 16ra.)

[6] Plaintiffs' initial opening appellate briefs, filed on August 16, 1994, were rejected by the Ninth Circuit as a result of Petitioner's violation of several Ninth Circuit procedural rules.

made out below, and the Ninth Circuit found that the plaintiffs did not demonstrate any "extraordinary circumstances" which prevented plaintiffs from seeking more timely relief, such as filing a direct appeal. (Pet'r App. 4.) Indeed, the appellate court noted that prior Ninth Circuit law had specifically rejected the type of "extraordinary circumstance" put forth by plaintiffs in support of their claim for Rule 60(b)(6) relief. (Pet'r App. 4-5.) The Ninth Circuit also found that the District Court did not abuse its discretion in refusing to grant plaintiffs' request for transfer because the cases had been dismissed and, therefore, there were no cases left to transfer. (Pet'r App. 5-6.) Furthermore, as a result of the frivolous nature of the appeal, the Ninth Circuit awarded sanctions against the plaintiffs' attorney, Petitioner herein, for attorneys' fees and double costs and directed the Ninth Circuit Appellate Commissioner to "determine the amount of sanctions to be awarded each defendant." (Pet'r App. 6.)

Petitioner challenged the Ninth Circuit's award of sanctions in a Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond, alleging that the Ninth Circuit's failure to comply with the amended version of Fed. R. App. P. 38 violated its due process rights. (Pet'r App. 69.) The Ninth Circuit denied the Motion to Vacate on June 7, 1996. (Pet'r App. 77.)

The Ninth Circuit's Appellate Commissioner filed an Order quantifying the amount of sanctions on September 16, 1996. (Pet'r App. 22.) Two weeks later, on September 30, 1996, Petitioner moved for reconsideration of portions of that award, but included no mention of Petitioner's previous Rule 38 challenge. (Pet'r App. 9.) The Ninth Circuit denied Petitioner's motion for

reconsideration on March 6, 1997, and Petitioner now bases the timeliness of its Petition for a Writ of Certiorari upon that denial of reconsideration. (Pet'r App. 7.)

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT COMPLIED WITH THE VERSION OF RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN EFFECT DURING THE RELEVANT TIME PERIOD.

On the days that Petitioner filed the notices of its frivolous appeal with the Ninth Circuit — April 14 and 15, 1994 — the pre-amendment version of Fed. R. App. P. 38 was in effect. Indeed, on the dates that Petitioner filed its opening appellate briefs (September 1, 1994), Respondents filed their opposition briefs (September 28, 1994), and defendant-appellee Owens-Illinois, Inc. filed opposition briefs that included an unequivocal request that Petitioner be sanctioned pursuant to Rule 38 (October 3, 1994), the pre-amendment version of Rule 38 was in effect. The earlier version of Rule 38 was also in effect on November 1, 1994, when Petitioner, ignoring the request for sanctions, completed the briefing of its frivolous appeal by filing reply briefs. Thus, *all* of Petitioner's sanctionable conduct involving the filing and briefing of its frivolous appeal took place prior to the December 1, 1994 effective date of the amendment to Rule 38.

During the time of Petitioner's sanctionable conduct and the briefing of that appeal, separate notice and an opportunity to respond prior to the imposition of sanctions were not required by the Federal Rules of Appellate Procedure, but were merely discretionary with the circuit

courts. The Ninth Circuit exercised its sound discretion not to require separate notice and hearing when the frivolous appeal was filed — and a then proper request for sanctions was made — before the new requirements went into effect.

A. The Version of Fed. R. App. P. 38 in Effect at the Time of Petitioner's Sanctionable Conduct and Throughout the Briefing Phase of the Appeal Did Not Require Separate Notice or an Opportunity To Respond.

Rule 38 of the Federal Rules of Appellate Procedure authorizes an appellate court to impose sanctions in the form of attorneys' fees and costs against a party, like Petitioner, that has filed a frivolous appeal. Fed. R. App. P. 38.

An amendment to the Rule, effective December 1, 1994, now requires a separately filed motion for sanctions or notice from the court and an opportunity to respond before sanctions may be imposed. *Id.* The earlier version of the Rule was more expansive and required no such special notice or opportunity to respond. It provided that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Fed. R. App. P. 38 (amended 1994).

Prior to the 1994 amendment to Rule 38, an appellate court could, in its sound discretion, impose sanctions for a frivolous appeal either *sua sponte* or upon a request by the appellee made in that party's opposition to the appeal. "[D]amages are awarded by the court in its

discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant." Fed. R. App. P. 38 advisory committee's note to 1967 adoption. *See also, Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir.) (sanctions need not be sought to be awarded), *cert. denied*, 474 U.S. 1021 (1985). Prior to the 1994 amendment, no separate notice was required before Rule 38 sanctions could be imposed; the mere existence of Rule 38 and precedential case law imposing the Rule were found to provide adequate notice to satisfy due process. In *Romala Corp. v. United States*, 927 F.2d 1219 (Fed. Cir. 1991), the Federal Circuit stated:

> Nor does due process require any specific notice or opportunity for additional briefing or a hearing prior to imposition of Rule 38 sanctions under the circumstances presented here. The due process requirement of adequate notice is satisfied by the elementary principle that "practitioners in this court are expected to know and follow the Federal Rules of Appellate Procedure and the precedents in the court's published jurisprudence," including Rule 38 and our lengthy line of decisions applying it in appropriate cases.

927 F.2d at 1226 (citing *In re Perry*, 918 F.2d 931, 935 (Fed. Cir. 1990)).

Moreover, prior to the 1994 amendment to Rule 38, an opportunity to respond was not required before sanctions could be imposed for a frivolous appeal. *Smith v. Ricks*, 31 F.3d 1478, 1489 (9th Cir. 1994) (imposing sanctions without separate hearing), *cert. denied*, 115 S. Ct. 1400 (1995); *Toepfer v. DOT*, 792 F.2d 1102, 1103 (Fed. Cir. 1986) (to require hearing for assessment of damages

pursuant to Rule 38 "would impose on the opposing party and on the court an even greater burden in dealing with a frivolous appeal and entirely defeat the purpose of Rule 38").

The Seventh Circuit in *Hill v. Norfolk and Western Railway Co.*, 814 F.2d 1192 (7th Cir. 1987), took pains to explain why an opportunity for written or oral explanation was not necessary:

> Where, *as in this and most Rule 38 cases*, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct.

Hill, 814 F.2d at 1201 (emphasis added). *Accord, Romala Corp.*, 927 F.2d at 1226-27. *See also, Toepfer v. DOT*, 792 F.2d at 1103 (Fed. Cir. 1986) (citing *Hyde v. Van Wormer*, 474 U.S. 992 (1985), in which this Court awarded damages under its Rule 49.2 without a hearing).

Based on the foregoing, it is clear that at the time Petitioner filed and briefed its frivolous appeal, Rule 38 afforded Petitioner no right to notice or an opportunity to respond prior to the imposition of sanctions by the Ninth Circuit. Any due process requirements for notice were met by the actual existence of Rule 38 and Petitioner's obligation to know the Rules, the actual notice in Owens-Illinois' briefs, and, as set out *infra* at Section III.A., the fact that Petitioner had been warned about similar

sanctionable conduct by other courts. Any due process requirements for an opportunity to respond were likewise met because Petitioner had a chance to reply to the demand for sanctions which were plainly requested in the Owens-Illinois' briefs, but did not.

B. The Ninth Circuit Did Not Abuse Its Discretion in Applying the Earlier Version of Rule 38.

1. It Was Not "Just and Practicable" To Apply the Amended Version of Rule 38 to Petitioner's Frivolous Appeal.

Petitioner failed to advise this Court in its petition that the version of Rule 38 in effect at the time of Petitioner's frivolous appeal did not require separate notice or an opportunity to respond before the Ninth Circuit could impose sanctions. In fact, Petitioner simply assumes that amended Rule 38 automatically applied to all matters pending on the date of its implementation. This assumption is, however, incorrect. In its transmission to Congress of the 1994 Amendment of Rule 38, this Court ordered:

> 2. That the foregoing amendments to the Federal Rules of Appellate Procedure [including Rule 38] shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases thereafter

> commenced and, *insofar as just and practicable*, all proceedings in appellate cases then pending.[7/]

Thus, pursuant to this Court's clear instructions, the Ninth Circuit was not required to apply the 1994 amendment to Rule 38 to the pending appeal in *Miller* and *Abar*. Instead, absent a determination by the appellate court that application of the amended Rule would be "just and practicable," the prior version of Rule 38 was properly applied to the pending appeal.

Petitioner has failed to make any showing that application of the amended version of Rule 38 to its frivolous appeal would be just and practicable.[8/] Nor could such a showing be made. There was no just reason to apply the amended Rule when all of Petitioner's conduct giving rise to the imposition of sanctions took place *prior to* the effective date of the amendment. Similarly, there was no just reason to apply amended Rule 38 to this case when, as set forth *infra* at Section III.A., Petitioner was on notice from numerous federal courts that the filing of claims virtually identical to the claims that were the subject of this appeal was frivolous and/or sanctionable. Moreover, it was not practicable to apply the amended version of the Rule when all briefing by the parties in the *Miller* and *Abar* appeal had been concluded well before the effective date of the amendment. Thus, it was not

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[7/] *See* Communication from the Chief Justice, the Supreme Court of the United States, Amendments to the Federal Rules of Appellate Procedure, H.R. Doc. No. 247, 103d Cong., 2d Sess., 1 (1994) (the relevant portions of which are included herein at Resp'ts App. 1ra-5ra) (emphasis supplied).

[8/] Indeed, Petitioner has failed to even address the "just and practicable" requirement in its petition.

"just and practicable" for the Ninth Circuit to apply the amended version of Rule 38 to Petitioner's appeal. Indeed, under the circumstances presented here, application of the amended Rule would have worked an *injustice* upon Respondents and the other defendants by forcing them to incur more expense in defending Petitioner's claim that its frivolous appeal was not sanctionable and more delay in receiving the attorneys' fees and costs to which they are entitled.

A single appellate case has discussed whether imposition of the amendment to Rule 38 on a pending appeal that had been fully briefed prior to the effective date of the amendment was appropriate. *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526 (6th Cir. 1995). In *Simmons*, as in *Miller* and *Abar*, the appellate court imposed sanctions after the effective date of Rule 38's amendment for the filing of a frivolous appeal that took place *prior to* the effective date of the amendment. As in *Miller* and *Abar*, appellee's brief contained a request for sanctions, but there had been no separately filed motion or notice from the court.

The *Simmons* court found that the reply brief, which responded to the request for sanctions, evidenced the appellant's notice of the request. Consequently, the court held that separate notice and an opportunity to respond was not necessary before sanctions could be imposed. *Id.* at 531.

In this case, Petitioner was also on notice of the Ninth Circuit's consideration of sanctions through defendant-appellee Owens-Illinois' requests for sanctions in its briefs. (Pet'r App. 58-59, 65-66.) Petitioner's failure to respond to those requests for sanctions should

not be made the basis for according it yet another opportunity to forestall the imposition of sanctions.

2. The Ninth Circuit's Application of the Earlier Version of Rule 38 Was an Exercise of Common Sense.

The Ninth Circuit's imposition of the unamended Rule 38 was an exercise of common sense applied to the facts of a particular case, an exercise in discretion approved by this Court. "Our orders approving amendments to federal procedural rules reflect the common sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994) (citing the "just and practicable" language that usually accompanies this Court's Orders amending Federal Rules).

In *Landgraf*, the issue was whether a substantive amendment to the Civil Rights Act of 1991 should apply to cases arising before its enactment where the statute was silent as to retroactivity. In discussing the general prescription against statutory retroactivity, this Court also commented about the retroactivity of procedural rules. Specifically, this Court stated that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.*[9] Instead, this Court noted that

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[9] As an example of a situation in which a new procedural rule would *not* apply to a pending case, this Court stated that "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . ." *Id.* Similarly, the amendment to Rule 38 should not apply to cases like *Miller* and *Abar* where a request for sanctions had been properly made under the earlier version of the Rule.

courts must employ a common sense approach in deciding whether procedural changes should be applied to pending cases. *Id.* Thus, this Court has left determinations of what constitutes a "just and practicable" application of Rule changes to pending matters to the common sense of each court. This common sense must, necessarily, be applied on a case-by-case basis.

The common sense approach to the application of new amendments to procedural Rules has been applied by federal courts in other contexts. For example, the 1993 amendment to Federal Rule of Civil Procedure 11 was introduced by this Court with similar "just and practicable" language as that used to introduce the 1994 amendment to Fed. R. App. P. 38. In determining which version of Rule 11 to apply to cases pending as of the effective date of the amendment, courts used a common sense approach which typically focused on the version of the Rule in effect at the time of the sanctionable conduct. *See, e.g., In re Generes*, 69 F.3d 821, 826-27 (7th Cir. 1995) (applying the former version of Rule 11 where initial brief filed prior to amendments even though district court's decision and motion for sanctions filed after effective date), *cert. denied*, 117 S. Ct. 81 (1996); *MacDraw, Inc. v. CIT Group Equip. Fin.*, 73 F.3d 1253, 1257 (2d Cir. 1996) ("Because the allegedly sanctionable conduct in this case occurred prior to the effective date of the 1993 amendments, the district court was required to apply the standard of conduct set forth in the pre-1993 Rule [11]"); *Silva v. Witschen*, 19 F.3d 725, 728 (1st Cir. 1994) ("[W]e review the . . . sanction order under the pre-amendment Rule 11 standards in force at the time the sanctioned conduct occurred."); *Agretti v. ANR Freight Sys., Inc.*, No. 89 C 5492, 1994 WL 46670, at *1, 1994 U.S. Dist. LEXIS

1433, at *2-3 (N.D. Ill. Feb. 7, 1994) (applying version of Rule 11 in effect at the time of the sanctionable conduct).

Here, the Ninth Circuit applied its common sense and exercised its discretion not to apply the 1994 amendment to its imposition of sanctions as to conduct that occurred well before the effective date of the amendment to Fed. R. App. P. 38. That decision was just and practicable, and does not warrant review by this Court.

II. PETITIONER HAS FAILED TO SHOW ANY REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI TO THE NINTH CIRCUIT.

This Court is well aware of its own considerations governing review on certiorari. *See* Sup. Ct. R. 10. Despite Petitioner's assertions to the contrary, it has presented no compelling reasons to justify this Court's review. The Ninth Circuit's decision not to apply the amended version of Rule 38 to the imposition of sanctions in *Miller* and *Abar* creates no conflict among the circuits; every appeal cited by Petitioner to justify such a conflict was brought or briefed after the 1994 amendment was implemented. Petitioner has failed to cite a single case in which a circuit court required a separate motion for sanctions where a request had been made during briefing that was completed before the amendment went into effect. Neither has Petitioner offered any other compelling reasons to justify review. *See* Sup. Ct. R. 10. A decision by this Court would affect no one but the parties involved and would fail to serve the ends of justice in any way. Rather, it would merely squander this Court's time and resources while delaying the inevitable results of Petitioner's frivolous conduct.

A. The Ninth Circuit's Decision Comports with Similar Discretionary Determinations Made by Other Circuits.

The Ninth Circuit's decision to impose sanctions on Petitioner's frivolous appeal of *Miller* and *Abar* created no conflict among the circuits sufficient to justify review of that decision by this Court. *See* Sup. Ct. R. 10.[10/] The issue in this matter — whether a circuit court properly exercised its discretion not to apply the 1994 amendment to Fed. R. App. P. 38 to a case that had been appealed and fully briefed prior to that amendment's implementation date — has been reached by only one other circuit court. In that action, *Simmons v. Allstate Life Ins. Co.*, the Sixth Circuit reached the same conclusion as the Ninth Circuit did in *Miller* and *Abar*. *Simmons*, 65 F.3d at 531; *see supra* Section I.B.1. In its attempt to create a conflict where none exists, Petitioner has cited, either intentionally or inadvertently, five cases appealed *after* the amendment's implementation date when separate notice and opportunity to respond were required. These cases are irrelevant to the

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[10/] Sup. Ct. R. 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
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> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power.

central issue in this case of whether the Ninth Circuit was correct in imposing sanctions pursuant to the earlier version of Rule 38, in effect at the time of Petitioner's sanctionable conduct and at the time during which the appeal was briefed.[11/]

The remaining three cases on which Petitioner bases its allegation of a conflict among circuits are also immaterial to a review of the propriety of the Ninth Circuit's decision in *Miller* and *Abar*. In each of these cases, courts applied the 1994 amendment to Fed. R. App. P. 38 to appeals filed prior to the amendment's effective date. In two of those cases, however, briefing had not yet been completed by December 1, 1994, and so the parties were not prejudiced by application of the amendment. In one of those cases, *Clark v. Central Cartage Co.*, the Sixth Circuit specifically stated that it did not apply the unamended version of Fed. R. App. P. 38 when briefing had not been completed prior to the Amendment's implementation. That court distinguished its prior decision in *Simmons*: "*Simmons* is distinguishable from the case at bar, because, in this case, the company [appellee] filed its brief after amended Rule 38 became effective." *Clark*, 73 F.3d 361 (table), 1995 WL 758459, 1995 U.S. App. LEXIS 38820, at *9 (6th Cir. Dec. 21, 1995) (appellant brief filed 1/25/95; appellee brief filed 2/24/95). *See*

[11/] *See Ullman-Briggs, Inc. v. Deerfield Housewares, Inc.*, 100 F.3d 942 (table), 1996 WL 20512, 1996 U.S. App. LEXIS 2435 (2d Cir. Jan. 19, 1996) (No. 95-7827); *T.G.C. Corp. v. Park*, No. 96-5638, 1997 WL 234614, 1997 U.S. App. LEXIS 10637 (6th Cir. May 6, 1997); *Matter of Bero*, 110 F.3d 462 (7th Cir. 1997) (No. 96-2828); *Schroeder v. K & K Ins. Group, Inc.*, 70 F.3d 1274 (table), 1995 WL 687663, 1995 U.S. App. LEXIS 34004 (7th Cir. Nov. 16, 1995) (No. 95-1148); *Nordberg, Inc. v. Telsmith*, 82 F.3d 394 (Fed. Cir. 1996) (No. 95-1316).

K & T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171 (6th Cir. 1996) (applying Fed. R. App. P. 38's 1994 amendment to imposition of sanctions where appellate briefs first filed on January 27, 1995). By contrast, in *Miller* and *Abar*, as in *Simmons*, briefing of the case was finished by the time the amended Fed. R. App. P. 38 became effective.

The last case cited by Petitioner was a Seventh Circuit opinion requiring separate notice and opportunity to respond for an appeal briefed prior to December 1, 1994, but that case is also irrelevant to the Ninth Circuit's decision in *Miller* and *Abar*.[12/] Since February 1, 1992, Seventh Circuit Rule 38 (as distinguished from Fed. R. App. P. 38) has required separate notice and an opportunity to respond prior to the imposition of appellate sanctions. *McDonough* was docketed on July 27, 1994, and was thus subject to Circuit Rule 38. In short, no other circuit has acted differently than the Ninth Circuit under similar facts. Rather, the Sixth Circuit, in *Simmons*, made the identical decision. Quite simply, no conflict among the circuits exists.

B. This Case Presents No Departure from Prior Ninth Circuit Rulings.

Petitioner has also asserted that the imposition of sanctions in *Miller* and *Abar* was unprecedented within the Ninth Circuit; that the decision had so far departed from that court's prior rulings so as to justify this Court's supervision. *See* Sup. Ct. R. 10(a). In fact, all but one of the appeals in the Ninth Circuit decisions cited by Petitioner as support for this contention were — like the

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[12/] *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256 (7th Cir. 1995).

appellate decisions Petitioner cited from other circuits — also filed or briefed *after* the Fed. R. App. P. 38 amendment's implementation date.[13/] Stripped of these irrelevant cases, Petitioner's brief mentions — at the end of a footnoted string cite — a single, unreported Ninth Circuit opinion in which that court applied the amendment to Fed. R. App. P. 38 to an action in which the briefing had been completed before the amendment's implementation date. *In re Rudnick*, 62 F.3d 1423 (table), 1995 WL 460360, 1995 U.S. App. LEXIS 22469 (9th Cir. Sept. 3, 1995) (No. 94-15733; appellant's reply brief filed Aug. 18, 1994). In that case, however, the court applied Fed. R. App. P. 38

[13/] *See Gabor v. Frazer*, 78 F.3d 459 (9th Cir. 1996) (No. 94-17133; appellant brief filed 3/6/95; appellee brief filed 3/30/95); *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996) (No. 95-35183); *In re Am. Continental Corp.*, 102 F.3d 1524 (9th Cir. 1996) (Nos. 95-15759, 95-16403, 95-16595, 95-16754). *See also, In re Sovereign Partners*, 110 F.3d 70 (table), 1997 WL 160279, 1997 U.S. App. LEXIS 6598 (9th Cir. Apr. 4, 1997) (No. 95-15804); *In re Wall*, 108 F.3d 340 (table), 1997 WL 74470, 1997 U.S. App. LEXIS 3139 (9th Cir. Feb. 18, 1997) (No. 95-55887); *Regal Capital, Inc. v. Valencia*, 106 F.3d 408 (table), 1997 WL 31139, 1997 U.S. App. LEXIS 1105 (9th Cir. Jan. 21, 1997) (No. 95-17249); *Aguilar v. Sunland Beef Co.*, 89 F.3d 844 (table), 1996 WL 218188, 1996 U.S. App. LEXIS 11049 (9th Cir. Apr. 29, 1996) (No. 95-15028); *In re Lund*, 83 F.3d 427, 1996 WL 183658, 1996 U.S. App. LEXIS 9756 (9th Cir. Apr. 12, 1996) (No. 95-55887); *Payne v. Exxon Corp.*, 73 F.3d 370 (table), 1995 WL 766016, 1995 U.S. App LEXIS 38376 (9th Cir. Dec. 29, 1995) (95-35183); *Shiloh v. Reader's Digest Ass'n Inc.*, 62 F.3d 1425, 1995 WL 465774, 1995 U.S. App. LEXIS 22927 (9th Cir. Aug. 7, 1995) (No. 94-56425; appellant's brief filed 11/23/94 ruled "deficient" by the court and appellant refiled opening brief 2/22/95); *In re Allustiarte*, 62 F.3d 1425 (table), 1995 WL 460407, 1995 U.S. App. LEXIS 22468 (9th Cir. Aug. 3, 1995) (No. 94-15739; appellant's reply brief filed 12/22/94); *Fordjour v. Forties Benefits Ins. Co.*, 57 F.3d 1076, 1995 WL 341562, 1995 U.S. App. LEXIS 14446 (9th Cir. June 8, 1995) (No. 94-16484; appellant reply brief filed 12/19/94).

sua sponte; there is no indication that the appellee had moved for sanctions. The Ninth Circuit's decision to provide notice and an opportunity to respond under those circumstances is easily distinguishable from *Miller* and *Abar*, where Petitioner was put on notice of the possibility of sanctions by Owens-Illinois' appellate briefs.

Thus, Petitioner has failed to demonstrate that a single decision exists in which a court has required separate notice and an opportunity to respond where sanctions have been imposed pursuant to an appellee's request and briefing has been completed prior to the implementation of the 1994 amendment to Fed. R. App. P. 38. The Ninth Circuit has not strayed from its prior decisions in this matter, and its determination in *Miller* and *Abar* does not warrant the exercise of this Court's supervisory power. No important matter exists; no compelling reasons for review have been raised. Petitioner merely wants yet another chance to delay the latest consequences of its repeated sanctionable behavior.

C. Petitioner Seeks Only To Delay — Not To Oppose — the Imposition of Sanctions.

Delay, not avoidance, of the Ninth Circuit's award of sanctions could be the only relief this Court could provide to Petitioner, because even with notice and an opportunity to respond to a request for sanctions, Petitioner has no excuse for its sanctionable behavior. In none of the many opportunities given Petitioner to justify the bringing of the frivolous appeal in *Miller* and *Abar* has Petitioner provided an explanation for the bringing of the appeal — not in the appellate Reply Brief, not in the Motion to Vacate Sanctions, not in the Motion for Reconsideration of Sanctions. At no point has Petitioner asserted that notice

of sanctions would have altered its behavior. At no time has Petitioner denied the frivolous nature of the appeal. Rather, Petitioner merely seeks to delay the inevitable imposition of sanctions by the Ninth Circuit through the waste of this Court's resources and the expenditure of time and energy of all parties concerned.

The Ninth Circuit found the appeal of *Miller* and *Abar* frivolous. That court then imposed sanctions. Even if Petitioner were to succeed before this Court on the merits of this dispute, eventually — with yet more notice and yet another opportunity to respond — sanctions will be imposed. This Court should not be made a forum by which Petitioner can delay — but not prevent — payment of sanctions for its frivolous appeal.

III. DUE PROCESS WAS NOT DENIED BECAUSE PETITIONER HAD ADEQUATE NOTICE AND REASONABLE OPPORTUNITY TO RESPOND TO THE IMPOSITION OF SANCTIONS.

A. Petitioner Ignored the Threat of Sanctions from Several Sources.

Petitioner *was* on prior notice from several different sources that sanctions could be imposed by the Ninth Circuit. Specifically, as set forth earlier, the briefs of defendant-appellee Owens-Illinois, in both the *Miller* and *Abar* actions, contained a separate section requesting sanctions that fully set forth authority to support the request. (Pet'r App. 58-59, 65-66.) By means of these repeated requests for sanctions, Petitioner was specifically on notice that sanctions were directly requested.

In addition to the specific notice provided to Petitioner by Owens-Illinois, Petitioner should have been aware of the existence of Rule 38 and the Ninth Circuit's imposition of sanctions pursuant to that Rule. *See, e.g., Smith v. Ricks*, 31 F.3d at 1489 (imposing sanctions without separate hearing); *In re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989) (Rule 38 sanctions imposed directly on counsel) (citations omitted); *Hatch v. Reliance Ins. Co.*, 758 F.2d at 416 (awarding double costs and attorneys' fees *sua sponte*); *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (awarding sanctions pursuant to Rule 38 for frivolous appeal).

Moreover, Petitioner had notice from other courts that it was risking sanctionable conduct by pursuing an appeal of the dismissal of *Miller* and *Abar* to the Ninth Circuit. Indeed, *prior to* the time that Petitioner filed its appeal in *Miller* and *Abar*, several district courts and one appellate court had considered complaints filed by Petitioner that were virtually identical to the complaints filed in *Miller* and *Abar*. In dismissing each one of these actions, these courts made it clear that Petitioner's complaints were meritless and worthy of sanctions. *See Abbey v. ACandS, Inc.*, No. C-93-2813 MHP (N.D. Cal. Sept. 27, 1993) (*sua sponte* dismissing action, virtually identical to those filed in *Miller* and *Abar*, filed by Petitioner on behalf of 1,000 individuals in the U.S. District Court for the Northern District of California, where the complaint was "so abusive that it may well invoke sanctions under Rule 11") (Resp'ts App. 24ra); *Acevedo v. ACandS, Inc.*, No. 93-0629-AH-S (S.D. Ala. Oct. 28, 1993) (dismissing action, virtually identical to those filed in *Miller* and *Abar*, filed by Petitioner on behalf of 1,000 individuals in the U.S. District Court for the Southern District of Alabama, where the complaint was

held to be "an abuse of federal procedures and may well invoke sanctions under Rule 11") (Resp'ts App. 21ra); *see also, Abdullah v. ACandS, Inc.*, 30 F.3d 264, 270 (1st Cir. 1994) (affirming dismissal of action with prejudice, virtually identical to those filed in *Miller* and *Abar*, for Petitioner's failure to abide by district court's order requiring amendment of seriously deficient complaints filed on behalf of 1,000 individuals); *Brown v. ACandS, Inc.*, No. 2:93-1274 (E.D. Pa. Mar. 18, 1994) (dismissing action, virtually identical to those filed in *Miller* and *Abar*, originally filed by Petitioner on behalf of 1,000 individuals in the U.S. District Court for the Western District of Louisiana and holding that Petitioner had received "sufficient notice" of the complaint's deficiencies through "the previous rulings and orders of other district court judges in his similar companion cases") (Resp'ts App. 8ra.)[14/]

In view of the foregoing, it could hardly have come as a surprise to Petitioner that his appeal of the District Court's Dismissal Order in *Abar* and *Miller* would be deemed nothing more than the frivolous appeal of a meritless complaint. Petitioner was clearly on notice that sanctions could be imposed. Nevertheless, Petitioner's reply brief cavalierly ignored the threat of sanctions from other courts for similar conduct and the request for sanctions by Owens-Illinois. Petitioner should not be

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[14/] Nor was the Ninth Circuit decision the first time that monetary sanctions had been awarded against the Petitioner. *See, e.g., Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290 (5th Cir. 1997) (affirming district court's award of $7,000 sanction against Petitioner for swearing, threatening, and insulting former client's counsel during deposition).

granted redress by this Court for its own failure to recognize the consequences of its actions.

B. The Ninth Circuit Complied with the Spirit of the Amended Rule 38 and Accorded Petitioner Sufficient Due Process.

Even assuming, *arguendo*, that the Ninth Circuit was required to comply with the terms of amended Rule 38 before imposing sanctions against Petitioner, the spirit of the amended Rule was followed and Petitioner was accorded sufficient due process. The Advisory Committee Notes to the 1994 Amendment state that in the absence of a separate motion requesting sanctions, "notice must come from the court." The Notes continue that "[t]he form of notice from the court and of the opportunity for comment purposely are left to the court's discretion." Thus, the Ninth Circuit had the power to act according to the dictates of its own judgment in deciding the "form of notice" and "form of opportunity for comment."

The "form of notice" chosen by the Ninth Circuit was its Memorandum Disposition of April 16, 1996. The sanctions were then subject to the Appellate Commissioner's determination as to the amount of those sanctions. The Appellate Commissioner's General Order 6.3(e) expressly granted 45 days from entry of the Order in which to file a response to the applications for attorneys' fees and costs. (Pet'r App. 46.) Petitioner therefore expressly had the opportunity in its response to the applications to challenge the attorneys' fees and costs submitted by each of the defendant-appellees.

Furthermore, fourteen days after the Ninth Circuit's Memorandum Disposition, Petitioner filed a Motion to Vacate Summary Imposition of Rule 38 Sanctions or, in the Alternative, for Statement of Reasons and an Opportunity to Respond. In its brief in support of its motion, Petitioner could have explained, but chose not to, why sanctions should not be imposed. Petitioner also filed a Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs. In that motion — denied by the Ninth Circuit — Petitioner never even mentioned Rule 38.

Thus, Petitioner has had ample opportunity to explain why the request for sanctions should not have been granted, but has never once availed itself of those opportunities. The amended Rule calls for Petitioner to have a "reasonable" opportunity to respond and leaves the form of such opportunity for comment to the court. The Ninth Circuit afforded Petitioner reasonable opportunities for comment, each of which it refused to take. Petitioner has decried the deprivation of its right to be heard on this issue, but has wasted every opportunity to justify its bringing of a frivolous appeal to the Ninth Circuit.

As in *Simmons*, *supra* at 16, the Ninth Circuit's decision to consider the request for sanctions pursuant to the prior version of Rule 38 did not "prejudice the appellant or denigrate the recent amendment to the Rule." *Simmons*, 65 F.3d at 531. The spirit and intent of the requirements of amended Rule 38 that Petitioner be afforded notice and opportunity for comment were fully met. *Accord, Hoefler v. Caesars Tahoe*, 15 F.3d 1085 (table), 1994 WL 28354, at *2, 1994 U.S. App. LEXIS 2420, at *5 (9th Cir. Jan. 31, 1994) (finding it sufficient that spirit and intent of amended Rule 3(c) complied with).

Due process is a "flexible concept and the particular procedural safeguards required will vary depending upon all the circumstances." *Julien v. Zeringue*, 864 F.2d 1572, 1575 (Fed. Cir.) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)), *cert. denied*, 493 U.S. 917 (1989). Under the particular facts of this case, Petitioner's rights of due process have been satisfied, and Petitioner's assertions to the contrary are totally without merit.

CONCLUSION

In awarding sanctions, the Ninth Circuit properly applied the version of Rule 38 of the Federal Rules of Appellate Procedure in effect at the time of Petitioner's sanctionable conduct. Petitioner's claims that the Ninth Circuit erred, that a conflict among the circuits exists, and that due process has been denied are all erroneous. This matter is not worthy of further time and attention by this Court, and the Petition for Certiorari to the Ninth Circuit should be denied.

DATED at Washington, District of Columbia, this 4th day of August, 1997.

Respectfully submitted,

ARENT FOX KINTNER PLOTKIN & KAHN
Marc L. Fleischaker
Donald C. McLean*
Laurel A. Bedig
Rachel G. Lattimore
Counsel for Respondents
Fel-Pro Incorporated and
Felt Products Mfg. Co.

* Counsel of Record

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APPENDIX A

103d Congress, 2d Session---------House Document 103-247

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE AS ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MAY 2, 1994.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1994

Supreme Court of the United States
Washington, D.C. 20543

Chambers of
THE CHIEF JUSTICE

April 29, 1994

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

S/

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D C 20515

SUPREME COURT OF THE UNITED STATES

Friday, April 29, 1994

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28. United States Code.

settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority "as feasible."

Rule 35. Determination of Causes by the Court In Banc

* * * * *

(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

Committee Note

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

Rule 38. Damages and Costs for ~~delay~~ Frivolous Appeals

If a court of appeals ~~shall~~ determines that an appeal is frivolous, it may, after a separately filed

motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content; Answer; Action by Court if Granted.*-- A petition for rehearing may be filed

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)	)	
This Document Relates To USDC - Western District of Louisiana Charlie J. BROWN, ET AL. Civil Action No. 2:93-1274	)	CIVIL ACTION NO. MDL 875
	)	FILED MAR. 18 1994

ORDER

THIS MATTER came on for hearing the 11th day of March, 1994 at 10:30 AM upon the Court's Show Cause Order. Numerous defendants appeared through counsel; although a response was filed, plaintiffs were not present in person nor were they represented by counsel at the hearing.[1] The Show Cause Order of the Court was precipitated by the filing of

---

[1] Although this Court's Show Cause Order did not create an obligatory appearance by counsel at this hearing, the Court finds it discourteous at best for counsel to not be present or fail to notify the Court of the intent not to appear, particularly following counsel's complaint that the courts have been dismissing his actions sua sponte without notice or an opportunity to be heard. Counsel went on to state in his response to the Show Cause Order: "Fortunately, this Court has afforded these maritime claimants with an opportunity to respond to these misrepresentations and, hopefully, derail the runaway train of erroneous rulings."

numerous motions by the defendants for dismissal of this action or for alternative relief.

This case was initiated by the filing of a lawsuit on August 9, 1993 in the Western District of Louisiana naming 1,000 plaintiffs and 93 defendants. Similar lawsuits with different multiple plaintiffs and the same defendants were filed in the United States District Courts for the Districts of Maryland and Massachusetts, the Northern and Southern Districts of California, and the Southern District of Alabama. In each instance the local district court acted sua sponte to either dismiss the lawsuit or issue a show cause order which, following a hearing, then led to a dismissal order. In the matter before the Court, a similar show cause order had been entered by Judge Trimble on August 16, 1993; however, no hearing was held due to the transfer of the action to the Eastern District of Pennsylvania by the Multidistrict Panel.

The Court has reviewed the Complaint filed in this Action and specifically notes deficiencies relating to jurisdictional factors and individual plaintiff information that normally appear in complaints. The defendants cannot be presumed to respond to a complaint when they are unable to identify which plaintiff is suing them, the injury involved, when and where it occurred. Mylan Laboratories, Inc. v. Akzo, N.V., 770 F.Supp. 1053 (D.Md. 1991). With 1000 named plaintiffs and 93 named defendants, counsel for the plaintiffs was unable to individually identify the plaintiffs and defendants in 4½

pages of pleading, let alone provide a succinct statement of the elements of any single claim.[2]

Furthermore, the 1,000 plaintiffs assert joinder under Rule 20, F.R.C.P.[3], but there is a total failure to identify the facts of the "same transaction, occurrence, or series of transactions or occurrences" as required by Rule 20. There must be a "logical relationship" to meet the test of joinder under Rule 20. Dougherty v. Mieczkowski, 661 F.Supp. 267 (D.Del. 1987). The Court finds no stated relationship to meet this test.

Notwithstanding the concern of several federal courts regarding these identical deficiencies in counsel's other similar cases previously described, there has been no attempt by plaintiffs to amend the Complaint or even to provide this or any Court with the factual information which would sustain this action.

THIS COURT FINDS that the Complaint is deficient of necessary facts and allegations necessary for a Rule 20 joinder; and further,

THIS COURT ALSO FINDS that Plaintiffs' counsel has had sufficient notice of these deficiencies through the motions of the defendants and the previous rulings and orders of other district court judges in his similar companion cases to have

---

[2] In discussing the requirements of Rule 8(a)(2), F.R.C.P., Moore's Federal Practice sets forth: "But the general test remains constant: does the statement of the claim contain the required elements stated plainly and succinctly, and does it give fair notice to the opposite party?"

[3] Paragraph No. 1 of the Complaint commences: "This Complaint is brought under Rule 20 of the Federal Rules of Civil Procedure..."

responded in writing to this Court, to have requested the opportunity to amend the Complaint, or to otherwise have appeared and answered these inquiries regarding such deficiencies.

IT IS ORDERED that the Complaint IS DISMISSED WITHOUT PREJUDICE as to all defendants and that the following restrictions shall apply to any refiling by any of these plaintiffs against any of these defendants:

1. The plaintiff must be specifically identified by social security number and residence (Counsel shall further identify all similar lawsuits involving the same plaintiff).

2. Plaintiff's work history, as it relates to asbestos exposure, shall be set forth in detail.

3. Plaintiff's alleged disease shall be identified AND a medical report or diagnosis of such disease shall be attached to the complaint.

4. Each plaintiff shall require an individual lawsuit.

BY THE COURT

Date: 3/18/94

S/
Charles R. Weiner,
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED MAR 14 1994
U.S. DISTRICT COURT
SOUTHERN DISTRICT
OF CALIFORNIA

CREIGHTON MILLER,) Administrator for the Estates of Isaac W. Abraham, et al.) Plaintiff,) v.) AC and S, Inc. et al.,) Defendants)	CIVIL NOS. 93-1119(R) (RCM) & 93-1120(G) (BTM) ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT OF DISMISSAL
NORMAN ABAR, et al.) Plaintiffs,) v.) AC and S, Inc., et al.,) Defendants.)	

The instant actions are before the Court on Plaintiffs' motion for relief from judgment of dismissal, pursuant to Fed. R. Civ. P. 60(b)(6).[1/] Plaintiffs also request the court to transfer the above actions to the United District Court for the Northern District of Ohio. Because Plaintiffs have failed to meet the requirements of Fed. R. Civ. P. 60(b,)(6), their motion is denied, and because Plaintiffs' complaints were previously dismissed, there are no cases to transfer. Therefore the request to transfer is also denied.

I. Facts

A. Procedural History

These cases were brought on July 29, 1993 and August 2, 1993 respectively. In Miller, an administrator for the estates of 370 decedents brought suit against 93 Defendants. In the second complaint, Abar was the first of 994 named Plaintiffs suing the same 93 Defendants named in Miller.

The complaints on their face raised serious questions concerning this Court's jurisdiction, among other matters. There were also problems associated with coordinating the many different requests from Defendants' counsel. Therefore, on September 9, 1993, the Court issued a show cause order, requiring Plaintiffs' attorney to answer various questions concerning the factual and legal bases for the complaints, and staying the proceedings.

Prior to the stay, certain Defendants filed motions to dismiss. The hearing date on those motions was originally set for November 1, 1993.

1/ Pursuant to Southern District of California Local Rule 7.1(d)(1), I find this motion suitable for decision without oral argument.

On September 27, 1993, the Judicial Panel on Multidistrict Litigation issued a conditional transfer order for the above two cases.

On November l, 1993, the Court ordered Plaintiffs' attorney to respond in writing to the show cause order. The response was received on November 22, 1993.

Because this Court was obliged to determine whether these complaints were properly pleaded, and because certain Defendants had already moved to dismiss for defects in the complaints, this Court decided the motions to dismiss previously on file. Those motions, once set for November 1, 1993, were reset for January l8, 1994.

B. Order Granting Motions to Dismiss

On January 18, 1994, this Court issued a two part order. First, it dropped all but the first named Plaintiff in Abar, and the first of Plaintiff's decedents in Miller, for improper joinder under Fed. R. Civ. P. 20. Second, it dismissed the complaints tor failure to satisfy Fed. R. Civ. P. 8(a).

The order expressly stated that it was without prejudice to the dropped Plaintiffs -- or Creighton Miller on behalf of the dropped individual decedents -- instituting suit based on the claims attempted to be set forth in the original complaints, so long as any new filings complied with applicable law. In addition, the remaining Plaintiffs -- Creighton Miller as administrator for the Estate of Isaac W. Abraham and Norman Abar -- were given 21 days leave to amend their complaints to comply with Fed. R. Civ. P. 8.

As a result of this Court's January 18 order, the Multidistrict Litigation Panel vacated its conditional transfer order.

Finally, on January 31, 1994, rather than refiling separate complaints on behalf of the dropped parties, or amending the complaints on behalf of the remaining Plaintiffs, Plaintiffs' counsel filed the instant motion.

II. Discussion

A. Rule 60(b)(6)

Plaintiffs move for relief from judgment of dismissal pursuant to Fed. R. Civ. P. 60(b)(6). The full rule states that

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

As the rule itself reveals, Rule 60(b)(6) is a catchall provision. Its use is infrequent: it is properly invoked "only where extraordinary circumstances prevented a party from

taking timely action to prevent or correct an erroneous judgment." U.S. v. Alpine Land & Reservoir. Co., 984 F.2d 1047, 1049 (9th Cir. 1993), cert denied, 114 S.Ct. 60 (1993). A district court's decision on a Rule 60(b)(6) motion is reviewed under an abuse of discretion standard. Fiester v. Turner, 783 F.2d 1474, 1476 (9th Cir. 1986).

Here the ground of Plaintiffs' motion is that the statute of limitations has run on the claims of all of the Plaintiffs originally named in Abar, and on 108 of the decedents originally named in Miller.

Plaintiffs' motion is denied, for several reasons. First, Rule 60(b)(6) by its terms applies to final orders only. The January 18, 1994 order issued in these cases, however, was not a final order. Ruby v. Secretary of United States Navy, 365 F.2d. 385, 387 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967) (stating that dismissal without prejudice is nonappealable interlocutory order, unless it is clear that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make, thereby entitling Plaintiff to assume that he had no choice but to stand on his complaint").

The January 18, 1994 order dismissed the causes of action without prejudice. It also expressly stated that the dropping of all but the first-named Plaintiff or Plaintiff's decedent was "without prejudice to the dropped plaintiffs -- or Creighton Miller on behalf of the other individual decedents -- instituting suit based on the claims attempted to be set forth in the present Complaints." Hence the order was not final, and Rule 60(b)(6) does not apply.

Second, even if Rule 60(b) applies to the January 18, 1994 order, Plaintiffs have not shown that they are entitled to

the relief which the rule provides. As noted above, relief under Rule 60(b)(6) is available only in extraordinary circumstances. Alpine Land 984 F.2d at 1049. In addition, "relief may not be had where 'the party seeking reconsideration has ignored normal legal recourses.'" Id. (quoting In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989)). Hence "where parties have made deliberate litigation choices, Rule 60(b)(6) should not provide a second chance." Id.

Here there are several facts showing that deliberate litigation choices were made. First, Plaintiffs' counsel concedes that Plaintiffs or Plainfiff's decedents have similar claims pending in the U.S. District Court for the Northern District of Ohio. The fact that there are such cases demonstrates two things: first, Plaintiffs retain some claims; and second, Plaintiffs were indeed able to file properly pleaded, individualized complaints within the period required by the applicable statutes of limitations.

Second, counsel was put on notice concerning the deficiencies of these complaints as early as September 8, 1993, when this Court issued its show cause order. Plaintiffs could have attempted to amend these complaints at that time. Plaintiffs counsel could also have attempted to file amended complaints and separate, properly pleaded complaints on behalf of the dropped parties under the terms of the January 18, 1994 order. In addition, it was the decision of Plaintiffs' counsel to file the complaints in their original, improper form. Finally, subsequent to the January 18, 1994 order, there was the possibility of appeal.

There is a third reason why the Plaintiffs are not entitled to the relief Rule 60(b)(6) provides: courts have held that the fact that a statute of limitations might bar an action

does not, by itself, constitute an extraordinary circumstance under Rule 60(b)(6). Wagner Spray Tech Corp. v. Wolf, 113 F.R.D. 50 (S.D.N.Y. 1986). Since the statute of limitations argument is Plaintiffs' sole ground for relief, it follows that Plaintiffs' motion should be denied.

B. Transfer

Plaintiffs also request that this Court transfer the instant actions to the U.S. District Court for the Northern District of Ohio. The request is denied, for two reasons.

First, because the motion for relief from judgment is denied, and because the complaints in these cases have been dismissed, there are simply no causes of action to transfer.

Second, 28 U.S.C. § 1404(a) governs a motion to transfer. Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The moving party bears the burden of demonstrating "by particular circumstances" that transfer is appropriate. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979).

Here Plaintiffs have failed to show by particular circumstances that transfer is appropriate. In particular, they have not given any indication that transfer will serve the convenience of parties and witnesses. More important, transfer would add to rather than alleviate the cost to litigants and the expenditure of judicial resources.

III. Conclusion

For the above reasons, the motion for relief from judgment and the request for transfer are denied.

IT IS SO ORDERED.

Date: 3/14/94

S/
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RUBEN L. ACEVEDO, et al.)		
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 93-0629-AH-S
ACandS, INC., et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court on the filing of this action by approximately 1,000 plaintiffs against 93 defendants. [Doc. #4.] The claims are for injury and/or wrongful death of each of the plaintiffs, who are alleged to have suffered a host of diseases and injuries as a result of exposure to asbestos and asbestos-containing products on 9,824 different vessels. No attempt to file this complaint as a class action has been made.

For the following reasons, Plaintiffs' complaint is dismissed without prejudice.

I. SUBJECT MATTER JURISDICTION

Plaintiffs allege admiralty jurisdiction as the basis for this action; the complaint also alleges diversity jurisdiction for some plaintiffs.

This Court has no diversity jurisdiction in this case. In order to create diversity, 28 U.S.C. § 1332 requires the matter be between citizens of different states. The language of that statute was interpreted to mean there must be "complete diversity" in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See also, e.g., Carden v. Arkoma Assocs.*, _____ U.S. _____, 110 S. Ct. 1015 (1990). "Complete diversity" means that *every* plaintiff must be of diverse citizenship from *every* defendant. 1 Moore's Federal Practice ¶ 0.71[5.-2]. Exhibits A-I and A-II clearly show there is no complete diversity in this action; therefore, the Court has no diversity jurisdiction over this matter.

This Court has no admiralty jurisdiction in this matter. In their "Response and Memorandum to Order to Show Cause," Plaintiffs state

> [i]t is axiomatic that a seaman's product liability claims are governed by the general admiralty and maritime law. Specifically Plaintiffs' Counsel relies upon *Sheffield v. Owens-Corning Fiberglass*, 595 So. 2d 443 (Ala. 1992) to invoke the federal maritime law.

Response and Memorandum at p. 3. Plaintiffs' Counsel's reliance is misplaced; such product liability claims are *not*, in

this Circuit, governed by admiralty and maritime law.[1/] Federal maritime jurisdiction does not extend to personal injury and products liability claims brought by former seamen who were allegedly exposed to asbestos on a vessel. *Cochran v. E.I. duPont de Nemours,* 933 F.2d 1533, 1535 (11th Cir. 1991), *cert. denied,* _____ U.S. _____, 112 S. Ct. 881 (1992). Such an exercise of admiralty jurisdiction would not advance the policies behind a uniform federal law of admiralty. *Id.*

Plaintiffs have alleged no other grounds to invoke the subject matter jurisdiction of this Court; therefore, the cause is due to be dismissed for lack of subject matter jurisdiction.

III. IMPROPER JOINDER

Federal Rule of Civil Procedure 20 governs the permissive joinder of parties. Plaintiffs claim the joinder of the approximately 1000 plaintiffs in one action is proper under Rule 20. That rule provides the following (in pertinent part):

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all these persons will arise in the action.

1/ Decisions of state courts on admiralty questions are not binding authority on this Court.

Plaintiffs, in the introduction to their complaint, allege that "1,000 individual Plaintiffs of the United States Merchant Marine who served aboard 9,824 ships *in toto* as crewmembers comprising 68,434 separate sea voyages spanning contemporary seafaring careers to the year 1990, averaging 44 divers ships per Plaintiff who sailed to multiple ports-of-call throughout the world . . ." In light of these allegations (which Plaintiff cannot now dispute), it is inconceivable that the 1,000 plaintiffs assert any right to relief "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences." This action, therefore, is due to be dismissed without prejudice under Fed. R. Civ. P. 20(b) in order to prevent delay and prejudice.

IV. ABUSE OF PROCESS

This complaint is an abuse of federal procedures and may well invoke sanctions under Rule 11, which the Court may impose on its own motion. Fed. R. Civ. P. 11. There is no subject matter jurisdiction; Plaintiffs' sparse factual allegations cannot support the joining of 1000 plaintiffs; and Plaintiffs cannot avoid payment of the separate filing fees[2/] and venue requirements by filing a single action that is really 1000 separate actions.

The Court intends to spare the judicial system and defendants from the plethora of papers and motions for sanctions likely to ensue such an improper pleading by *sua sponte* dismissal of this action without prejudice to the

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2/ Plaintiffs have paid the required $120.00 filing fee for a civil action; if these actions were properly filed separately, the filing fees could be as much as $120,000.00.

plaintiffs each filing separate actions in the appropriate courts against the proper defendant or defendants. For the foregoing reasons, Plaintiffs' Complaint is **DISMISSED WITHOUT PREJUDICE.**

DONE this 28th day of October, 1993.

S/
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK L. ABBEY, et al.,	)	NO. C-93-2813 MHP
	)	
	)	
Plaintiffs,	)	**ORDER**
	)	
—vs .—	)	
	)	
ACandS INC., ACMC f/k/a NATIONAL GYPSUM, COMPANY, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

Plaintiffs have filed this action asserting the claims of approximately 1,000 plaintiffs against 93 defendants. The claims purport to be in admiralty and are for injury and/or wrongful death of each of the plaintiffs who are alleged to have suffered a host of diseases and injuries as a result of exposure to asbestos and asbestos-containing products.

The allegations of the complaint are contained in a little over four pages. The caption takes up 21 pages. Nowhere in the complaint is there any attempt to show how these various injuries or deaths are related to the same transaction or occurrence. The complaint is totally devoid of any basis for joinder or any allegations showing how each defendant is liable to each plaintiff.

The complaint is an abuse of federal procedures and rules governing joinder and pleading requirements under Federal Rules of Civil Procedure 9(b), 19 and 20. Indeed, it is so abusive that it may well invoke sanctions under Rule 11. Plaintiffs' counsel cannot under any stretch of legal imagination, let alone competent pleading practice, file a single action joining all of these parties on the sparse allegations of this complaint. Nor can plaintiffs avoid the separate filing fees, venue and, perhaps, jurisdictional requirements by filing a single action that is really 1,000 separate actions.

The court intends to spare the judicial system and defendants from the plethora of papers, and motions for sanctions, likely to ensue such an improper pleading by sua sponte dismissal of this action without prejudice to the plaintiffs each filing separate actions in the appropriate court against the proper defendant or defendants. If any of these actions are filed in this court, plaintiffs' counsel shall associate local counsel who is a member of the bar of this court before proceeding any further.

Therefore,

IT IS HEREBY ORDERED that this action is DISMISSED without prejudice in accordance with the foregoing.

IT IS SO ORDERED.

DATED: SEP 27 1993

S/
MARILYN HALL PATEL
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NORMAN ABAR, et al.,)	CIVIL NO. 93-1120(G)
)	(BTM)
)	
Plaintiffs,)	ORDER TO SHOW
)	CAUSE RE:
v.)	FACTUAL AND LEGAL
)	BASES FOR THE
)	INSTANT ACTION AND
AC and S, Inc., et al.,)	STAYING THE
)	PROCEEDINGS
)	
Defendants.)	
_____)	

The complaint in this matter presents on its face serious questions regarding not only the jurisdiction of this Court, but whether this Court has any connection with the claims and whether there has been compliance with the Federal Rules of Civil Procedure.

Additionally, it appears that the instant action is possibly appropriate for transferal by the Multidistrict Litigation Panel.

Therefore it is ordered that Alan Kellman, the attorney who signed this petition, appear, either in person or telephonically, before the undersigned Judge at 10:30 a.m. on November 1, 1993, to show cause why this action should be docketed in this Court. Mr. Kellman should demonstrate,

inter alia, the factual and legal basis for his contentions: (1) that counsel actually represents the 994 individuals designated as Plaintiffs and identified by what appears to be their social security numbers; he should also indicate whether they are properly joined pursuant to Rule 20 of the Federal Rules of Civil Procedure; (2) that the named Defendants are amenable to the jurisdiction of this Court; (3) that venue is proper in this district; (4) that the instant action is not an action that may properly belong in the United States District Court for the Eastern District of Pennsylvania, before the Honorable Charles R. Weiner, in accordance with 28 U.S.C. § 1407; and (5) that the instant action is not one already subject to transferal by the Multidistrict Litigation Panel.

In addition, because there are 93 Defendants in the instant action, and because there are numerous problems involved in coordinating the litigation should it remain in this District, this Court stays all proceedings until 30 days after the order this Court will issue subsequent to the November 1 hearing. The Clerk of the Court for the Southern District of California is ordered not to accept filings in the instant action until the stay is lifted.

IT IS SO ORDERED.

Date: 9/8/93

S/
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CREIGHTON MILLER, et al., Plaintiffs, v. AC and S, Inc., et al., Defendants.	CIVIL NO. 93-1119(R) (RCM) ORDER TO SHOW CAUSE RE: FACTUAL AND LEGAL BASES FOR THE INSTANT ACTION AND STAYING THE PROCEEDINGS

The complaint in this matter presents on its face serious questions regarding not only the jurisdiction of this Court, but whether this Court has any connection with the claims and whether there has been compliance with the Federal Rules of Civil Procedure.

Additionally, it appears that the instant action is possibly appropriate for transferal by the Multidistrict Litigation Panel.

Therefore it is ordered that Alan Kellman, the attorney who signed this petition, appear, either in person or telephonically, before the undersigned Judge at 10:30 a.m. on November 1, 1993, to show cause why this action should be docketed in this Court. Mr. Kellman should demonstrate, inter alia, the factual and legal basis for his contentions: (1)

that counsel actually represents the 370 individuals designated as Plaintiffs and identified by what appears to be their social security numbers; he should also indicate whether they are properly joined pursuant to Rule 20 of the Federal Rules of Civil Procedure; (2) that the named Defendants are amenable to the jurisdiction of this Court; (3) that venue is proper in this district; (4) that the instant action is not an action that may properly belong in the United States District Court for the Eastern District of Pennsylvania, before the Honorable Charles R. Weiner, in accordance with 28 U.S.C. § 1407; and (5) that the instant action is not one already subject to transferal by the Multidistrict Litigation Panel.

In addition, because there are 93 Defendants in the instant action, and because there are numerous problems involved in coordinating the litigation should it remain in this District, this Court stays all proceedings until 30 days after the order this Court will issue subsequent to the November 1 hearing. The Clerk of the Court for the Southern District of California is ordered not to accept filings in the instant action until the stay is lifted.

IT IS SO ORDERED.

Date: 9/8/93

S/
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX H

LEONARD C. JAQUES
Alan Kellman (#92442)
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FILED JULY 27 1993
US DISTRICT COURT OF
CALIFORNIA

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Creighton E. Miller, Administrator of the Estate of :

Isaac W. Abraham, Sr. (DOD 10/18/92) (181-20-7879)
Joe C. Adams (DOD 09/19/92) (246-22-1872)
Francisco Agosto (DOD 03/15/91) (084-22-5340)
Norman L. Aikman (DOD 09/06/92) (068-01-0281)
William Aldridge, Jr. (DOD 08/17/91) (354-14-1358)
Knowlton Allen (DOD 01/06/92) (258-30-1581)
Leon R. Allie (DOD 03/03/91) (534-26-6938)
John A. Anderson (DOD 12/20/91) (438-48-6134)
Scott E. Anderson (DOD 09/20/90) (296-14-0197)
Tyree E. Anderson (DOD 11/17/90) (569-16-8687)
William O. Anderson (DOD 06/22/91) (531-10-3963)
Pedro M. Angoco (DOD 07/22/91) (553-52-7965)
Angel Aponte Martinez (DOD 01/18/91) (428-40-4387)
Louis L. Arena (DOD 06/12/91) (437-05-9950)
Gene L. Armstrong (DOD 09/21/91) (500-18-0145)
Robert A. Art (DOD 07/17/92) (566-01-1232)
Edward M. Aubuchon (DOD 02/01/91) (489-26-9964)
Octave A. Auguste (DOD 08/31/90) (127-22-3180)
Guillermo B. Baez, Sr. (DOD 06/12/92) (286-26-2595)

Lloyd R. Baker (DOD 06/25/91) (454-18-3578)
Andres Banuchi (DOD 12/14/90) (092-07-4032)
George D. Barnes, Sr. (DOD 03/03/92) (307-14-0621)
Andrew M. Barnett (DOD 10/07/90) (443-14-0957)
Anthony J. Baroni (DOD 07/06/91) (438-07-1533)
Alton L. Beals (DOD 09/05/91) (239-07-8314)
Joao A. Belchior, Jr. (DOD 08/02/91) (129-14-7181)
Charlie P. Benson (DOD 07/08/91) (249-18-1371)
Allan F. Berlund (DOD 10/13/90) (547-26-1910)
Ferdinand Bernard (DOD 02/12/91) (437-12-4105)
James Berry (DOD 04/11/91) (462-40-8414)
Clarence W. Beverly (DOD 09/28/90) (262-24-1958)
Dalzell Beverly (DOD 06/16/91) (265-32-4178)
Harry A. Bishop, Sr. (DOD 08/30/92) (237-12-7951)
William R. Blecker (DOD 10/16/90) (535-16-9143)
Ronald R. Bloomquist (DOD 01/27/93) (381-16,8059)
Edward W. Bogden (DOD 01/24/91) (179-12-7186)
J.B. Booker (DOD 01/29/92) (450-48-9935)
Warren J. Boston (DOD 01/19/92) (421-16-6310)
Elijah Boyd (DOD 11/20/91) (439-16-7036)
Robert L. Bradford, Jr. (DOD 10/24/92) (217-05-2036)
James R. Bradley (DOD 11/09/91) (418-12-1132)
Creighton J. Brady (DOD 06/27/92) (261-05-7625)
Daniel G. Brennan (DOD 04/17/92) (389-50-1714)
Howard Brigman (DOD 09/08/91) (240-18-3673)
Henry P. Brown (DOD 03/26/91) (555-28-1610)
Lester Brown (DOD 04/08/91) (526-07-7760)
Clarence Brown, Sr. (DOD 08/18/92) (435-28-3937)
William Brown (DOD 01/17/91) (261-05-3096)
Roy J. Bru (DOD 10/09/90) (421-16-9550)
Adam Burghardt (DOD 10/24/90) (523-22-1189)
Charles E. Burns (DOD 09/01/90) (264-12-8824)
Earl M. Burris (DOD 10/11/90) (705-12-6795)
Walter G. Butterton (DOD 01/01/91) (224-20-8023)
Manuel Cabrera Ramos (DOD 09/01/90) (084-22-1649)

Benigno U. Calban (DOD 09/25/91) (575-03-0893)
Frank L. Calvin (DOD 10/12/91) (127-22-5028)
John G. Campbell (DOD 03/26/92) (569-40-0987)
Joseph B. Campbell (DOD 03/29/92) (198-05-0439)
Esteban Canales (DOD 11/24/91) (127-22-5437)
Theodore J. Canonge, Jr. (DOD 03/05/92) (434-32-0661)
Alfredo E. Cardenas (DOD 02/23/91) (131-03-1603)
David T. Carr (DOD 03/10/92) (099-16-2929)
Robert P. Carry (DOD 09/27/90) (166-12-8940)
Robert G. Carter, Sr. (DOD 10/07/90) (252-18-4567)
Harry M. Cartwright (DOD 08/23/92) (481-14-0473)
Eduardo Casas (DOD 02/26/91) (108-18-2132)
Paul E. Cassidy (DOD 01/27/91) (401-24-9562)
Ernesto A Castillo, Sr. (DOD 04/10/92) (080-20-1274)
Carter C. Chambers (DOD 09/15/92) (573-03-9989)
Francis Chapman (DOD 04/30/91) (086-12-2302)
Herbert C. Chattom (DOD 07/29/92) (421-20-5348)
Ken Nien Chen (DOD 01/02/91) (065-22-3955)
Bing Hong Chin (DOD 11/05/90) (078-20-4920)
Sterling Chin (DOD 01/26/91) (438-26-5696)
Eddie J. Christy (DOD 08/20/91) (386-32-7153)
Bernard J. Clark (DOD 11/18/91) (588-20-7872)
Victor A. Claudio (DOD 08/20/91) (119-22-3501)
John H. Cline (DOD 12/17/90) (561-38-2307)
Billy W. Connett (DOD 03/22/92) (374-14-9607)
Peter J. Corvia (DOD 11/08/90) (551-28-9735)
Harold H. Coulter (DOD 08/03/91) (505-20-3514)
Robert J. Cranston (DOD 03/03/92) (037-16-1674)
James W. Cross (DOD 10/11/90) (210-22-6054)
Percy Cruikshank, Jr. (DOD 10/30/90) (568-30-1416)
Armando Cruz Berrios (DOD 02/27/92) (061-24-5372)
Edward R. Culp (DOD 05/10/92) (263-12-7162)
Maurice F. Culp (DOD 04/28/91) (164-12-2687)
Silas Cummings, Sr. (DOD 05/28/92) (436-10-6898)
Harry J. Curtin (DOD 11/11/90) (136-16-4000)

Manuel Da Cruz (DOD 02/02/91) (119-22-1918)
Floyd E, Dare (DOD 01/30/92) (564-20-2563)
Clarence Davis (DOD 02/18/91) (264-58-4961)
Rene De Bellaistre (DOD 09/17/90) (105-22-4400)
Ricardo Deas (DOD 10/01/90) (260-18-5828)
Jose DeOliveira (DOD 11/02/91) (084-18--3158)
Daniel S. DeShields, Sr. (DOD 07/23/91) (064-09-0572)
John W. DeVaux, Sr. (DOD 03/18/91) (213-07-0827)
Clyde A. Dickie (DOD 01/16/92) (014-22-5115)
Chin Do Yee (DOD 11/12/90) (027-16-1727)
Pablo P. Dolendo (DOD 02/18/91) (097-18-8026)
Sidney L. Dolese (DOD 08/09/90) (436-18-9663)
Angelo H. Donisi (DOD 12/28/90) (148-14-6446)
Dave Douglas (DOD 03/16/91) (257-10-7972)
Cornelius J. Downey (DOD 02/15/91) (111-10-6658)
James M. Dunker (DOD 06/06/91) (249-20-4410)
Norman G. Ebanks (DOD 11/01/91) (094-24-6763)
Anders I. Ellingsen (DOD 04/16/91) (460-46-9112)
Theodore Elmore (DOD 01/04/92) (218-01-5920)
John W. English (DOD 08/19/90) (031-16-2972)
Alfred C. Ethridge (DOD 01/01/91) (423-30-9511)
Elegy L. Etter, Sr. (DOD 02/19/92) (450-16-6366)
Julio Evans De La Cruz (DOD 08/08/90) (051-18-3819)
James Evans (DOD 04/01/92) (251-34-3625)
Louis B. Evelyn (DOD 09/14/90) (081-14-0970)
Laurenco Fernandez Pereida (DOD 12/24/91) (063-30-6977)
Harriet A. Figueroa (DOD 03/06/91) (089-22-7367)
Ralph E. Fitzpatrick (DOD 09/19/90) (224-01-8983)
Hugh J. Fitzpatrick, Sr. (DOD 05/21/92) (019-14-6707)
Boniface Fontenelle (DOD 12/09/91) (119-22-2141)
George R. Fortes (DOD 09/12/90) (031-14-8432)
Harold R. Foster (DOD 11/13/90) (058-14-9369)
Edward E. Fowler (DOD 07/21/91) (246-38-5338)
Charles H. Gaboury (DOD 07/11/92) (541-14-2801)
Joseph Gallardo (DOD 09/13/90) (063-20-5664)

Roberto Gamundi (DOD 11/19/92) (436-60-5518)
Jesus Garcia Fernandez (DOD 09/20/90) (265-14-2502)
Tomas Garcia (DOD 08/20/92) (055-22-2099)
Dedrick Garthus (DOD 12/12/91) (470-09-2600)
John Gasowski (DOD 11/04/90) (054-18-4215)
Paul J. Gaydos (DOD 04/02/91) (190-05-5889)
Warren E. George (DOD 10/06/91) (439-54-4395)
Cecil Gilbert, Sr. (DOD 04/06/92) (460-10-9295)
Harold G. Gohl (DOD 05/10/92) (386-26-6930)
Miguel Gonzalez Lopez (DOD 02/20/91) (073-12-6459)
Zannie E. Goode (DOD 02/16/92) (418-18-9010)
Cornelius J. Gordon (DOD 11/20/90) (457-16-9586)
George C. Gordon (DOD 07/11/91) (558-03-7274)
Charles Gottshalk (DOD 09/01/91) (129-12-0692)
Leon J. Green (POD 12/04/90) (547-16-2346) .
Gene Greer (DOD 08/17/90) (533-03-7096)
Jose Guerrero (DOD 11/30/91) (119-22-8954)
Juan G. Gutierrez (DOD 01/09/92) (458-22-8846)
Roy Hadley, Sr. (DOD 04/15/91) (451-22-6487)
Arthur D. Haines (DOD 07/25/92) (391-24-0535)
Roberto Hannibal (DOD 05/14/91) (075-22-8083)
Bror E. Hanson (DOD 04/25/92) (134-24-1495)
Willie C. Harrell, Jr. (DOD 02/04/92) (231-01-5553)
William R. Harrell (DOD 02/11/92) (244-20-2832)
Burley G. Harris (DOD 07/29/90) (550-14-0836)
Cecil Harris (DOD 11/22/91) (452-26-1564)
John O. Harris (DOD 01/18/91) (223-32-3150)
Thomas S. Harris, Jr. (DOD 09/15/91) (226-16-7495)
Thomas C. Harris, Sr. (DOD 08/07/91) (222-05-1990)
Willie S. Harris (DOD 04/25/92) (261-32-8980)
Ashton M. Harrison, Sr. (DOD 09/23/90) (128-20-9389)
Clarence A. Hartnett (DOD 05/4/92) (024-14-0995)
Eugene F. Hathy (DOD 09/05/91) (268-01-3739)
John H. Haus (DOD 06/18/91) (109-12-4402)
Calvin C. Hayes (DOD 09/01/90) (423-64-7333)

Solomon N. Hayes (DOD 12/16/91) (232-30-0642)
James F. Haynes (DOD 07/28/91) (535-16-6446)
Leon S. Haynes (DOD 10/24/90) (266-10-4210)
Charles Helmstetter (DOD 04/26/91) (437-32-8580)
James B. Hendricks (DOD 10/12/91) (424-14-0501)
George Hendrix (DOD 12/15/91) (213-14-3698)
Sergesman N. Hendrix (DOD 08/24/90) (424-30-3592)
Warren J. Henry, Jr. (DOD 03/11/91) (433-40-3338)
Frank Hernandez Lozada (DOD 06/12/91) (217-14-0305)
Homer Hernandez (DOD 02/01/91) (063-22-0375)
Ralph A. Hernandez (DOD 10/14/91) (086-16-2002)
Irvine Herne, Jr. (DOD 08/ll/90) (249-30-4501)
Isadore J. Hiller (DOD 12/19/91) (219-01-6465)
Edwin G. Hohman (DOD ll/26/92) (483-16-6932)
William G. Holley (DOD 04/05/91) (462-48-3769)
Carl N. Holm (DOD 12/22/91) (483-10-5638)
Wayne J. Holman (DOD 02/16/91) (280-12-0324)
Frederick M. Hopkins (DOD 09/12/91) (401-26-7161)
Arne W. Hovde (DOD 10/13/92) (219-16-3321)
Joseph E. Howe (DOD 05/21/91) (060-28-2318)
Harold R. Huhndorf (DOD 09/16/90) (526-16-7114)
Samuel Hunter (DOD 06/04/91) (452-48-5028)
Joseph D. Hurley (DOD 12/13/90) (126-01-2987)
Kenneth R. Itter (DOD 07/23/91) (537-14-3532)
Ivory Jackson (DOD 09/18/91) (437-01-5921)
Ervin M. Jackson, Jr. (DOD 09/12/91) (418-56-2643)
Kara C. Jenkins (DOD 08/01/90) (255-24-5119)
Richard D. Johns (DOD 05/17/92) (235-22-5602)
Herman R. Johnson (DOD 03/20/91) (437-70-2780)
Orville W. Johnson (DOD 06/12/92) (219-01-5952)
Simon J. Johnson (DOD 07/28/90) (262-22-7335)
Woodrow Johnson (DOD 01/04/91) (374-22-5210)
Rudolph E. Johnston (DOD 08/30/90) (459-03-3149)
H. B. Jones (DOD 02/03/92) (429-32-4740)
Hughie Jones, Jr. (DOD 09/27/91)(205-14-6417)

Thomas Jones, Jr. (DOD 09/07/91) (266-09-9216)
Carl C. Jorgensen (DOD 10/15/91) (437-14-3519)
Wilford Joseph (DOD 01/03/91) (460-10-2059)
Charles Khedoo (DOD 01/06/92) (113-20-0730)
Edward J. Kilford, Jr. (DOD 10/16/92) (543-01-2114)
Retis C. King (DOD 04/02/91) (235-36-5422)
Mark T. Kinto (DOD 04/13/91) (212-34-8864)
Elias A. Kirkland (DOD 08/19/90) (436-10-3650)
James U. Knowles (DOD 03/24/91) (077-12-9995)
Edward A. Kohl (DOD 12/15/90) (266-20-1051)
Norman P. Kottemann (DOD 09/08/90) (435-22-2809)
Richard Kowalski (DOD 08/06/90) (376-32-1438)
Michael Kozusko (DOD 04/05/92) (063-22-0826)
Edward J, Kramer (DOD 01/19/91) (153-01-1736)
Henry G. Lai (DOD 06/10/92) (556-26-8029)
Chris F. Larsen (DOD 12/20/91) (133-07-2413)
Linwood L. Lawton (DOD 09/03/90) (224-30-7935)
James D. Lewis (DOD 10/24/91) (282-24-3085)
Jason Llanis (DOD 01/13/92) (132-05-3504)
Luis Lockarno (DOD 01/30/91) (435-40-7639)
Andrew S. Lucien (DOD 06/17/92) (433-28-8529)
Thomas S. Maldonado (DOD 04/02/91) (050-05-9335)
Bobby D. Mangold (DOD 07/01/91) (234-42-7617)
Joseph M. Manini (DOD 01/26/91) (576-07-2471)
Eddy Markle (DOD 12/30/91) (576-12-0504)
Ramon Martinez Castro (DOD 10/23/90) (126-26-4403)
Michael P. Masek (DOD 08/31/92) (263-28-2050)
Richard H. Mawhorter (DOD 11/11/91) (293-16-0831)
John J. McCaffery (DOD 12/24/90) (568-28-5792)
Richard McCants (DOD 10/12/90) (417-12-2193>
John A. McCarville (DOD 11/28/90) (535-16-5271)
William R. McClintic (DOD 02/11/91) (559-24-4314)
William L. McCoy, Sr. (DOD 10/04/91) (227-32-4240)
Mack J. McGee, Jr. (DOD 09/28/90) (557-32-8969)
Roger E. McKenna (DOD 03/21/91) (559-22-8719)

Thomas H. McQuay (DOD 08/04/90) (263-13-1136)
Sidney Meaux (DOD 09/30/90) (094-12-0494)
David Medina, Sr. (DOD 04/13/91) (433-40-8220)
Walter P. Meisner (DOD 08/13/90) (570-12-3029)
Agathangelos G. Melissnaratos (DOD 10/24/90) (554-32-4895)
Oswaldo Meron (DOD 05/29/92) (063-22-8659)
Robert L. Michalscheck (DOD 09/14/92) (531-34-1109)
William A. Milchling (DOD 05/20/91) (213-12-8556)
Lewis Miller (DOD 01/23/91) (298-16-8102)
Merle V. Milton (DOD 01/18/91) (313-22-9467)
James B. Mitchell, Sr. (DOD 07/16/91) (254-22-9854)
Leroy N. Mobley (DOD 03/07/91) (488-18-1686)
Macedonio Montoya (DOD 08/16/91) (455-32-2195)
John E. Moore (DOD 04/21/91) (053-18-8142)
Charles I. Moore, Sr. (DOD 12/15/91) (261-20-8654)
John C. Moran (DOD 11/28/90) (428-24-8508)
Edward L. Morelock (DOD 02/14/91) (283-22-8720)
Henry H. Morris (DOD 09/17/91) (247-38-3132)
Clarence Morse, Jr. (DOD 09/05/90) (418-18-2827)
Theodore Murrah (DOD 01/14/93) (418-18-9069)
Bill J. Myers (DOD 05/03/91) (387-20-3231)
Joe M. Napier (DOD 09/04/91) (267-32-8498)
Robert E. Neal (DOD 12/07/90) (249-10-4845)
George R. Nelson (DOD 05/28/91) (387-24-6137)
Joe W. Norman (DOD 12/01/90) (238-20-8723)
Andres Nunez (DOD 08/16/91) (113-20-8839)
Ismael C. Nunez (DOD 05/13/92) (349-24-8134)
Leopoldo Ojeda Morales (DOD 12/07/90) (219-09-1008)
John Onga (DOD 02/03/91) (132-10-7932)
Bernard F. Overstreet (DOD 12/09/91) (421-07-8014)
Don C. Paedae, Jr. (DOD 03/15/92) (493-10-7027)
Augustus D. Palmer (DOD 07/05/91) (075-18-4643)
Joseph Papu (DOD 03/28/91) (576-14-6465)
James R. Parker (DOD 01/12/92) (425-36-9114)

Joseph A.C. Patenaude (DOD 10/17/91) (721-03-7033)
Felimon Peniaranda (DOD 02/18/91) (558-20-1271)
Joaquin Pereira (DOD 09/05/90) (155-16-9640)
Luis J. Perez (DOD 01/16/91) (467-26-7913)
Joseph P. Perrina (DOD 06/07/92) (103-12-9798)
Moses H. Perry, Jr. (DOD 03/22/91) (416-30-1942)
Eugene G. Peters (DOD 10/17/92) (398-10-5819)
Leroy L. Peters, Sr. (DOD 11/25/91) (219-10-4772)
Burl W. Prichard (DOD 10/08/90) (409-03-4583)
Charles C. Pritchard (DOD 09/14/92) (269-12-0495)
William H. Pritz (DOD 10/07/90) (545-22-8694)
Adriano Quinones Martinez (DOD 09/24/91) (582-03-4095)
Alpheus Rainey (DOD 07/11/91) (097-07-9491)
Jan Rani (DOD 12/20/90) (132-01-6912)
Herbert J. Reichert, Jr. (DOD 04/03/91) (213-26-3995)
Jose C. Reyes Maldonado (DOD 08/17/90) (092-12-1472)
Felipe M. Reyes, Sr. (DOD 11/10/91) (423-01-9125)
Marcus A. Reynoza (DOD 08/10/90) (566-18-8874)
William H. Rhone (DOD 06/07/91) (422-45-5407)
Jerome M. Rice (DOD 04/12/91) (421-16-6655)
James Q. Rice, Sr. (DOD 09/25/92) (229-16-0230)
Nathaniel F. Richard (DOD 12/06/91) (434-36-0282)
Emiliano Rios Toro (DOD 02/25/91) (133-01-9119)
Esteban Rivera Carreras (DOD 06/07/91) (083-26-0740)
Benjamin E. Robbins (DOD 02/16/92) (267-50-6431)
John M. Rockstroh (DOD 04/0791) (220-01-3026)
George Rodgers (DOD 05/30/91) (126-13-7815)
Louis Rodock (DOD 10/11/90) (097-14-4253)
Angel Rodriguez Martinez (DOD 03/25/92) (219-09-2760)
Malcolm L. Rogers (POD 08/23/90) (564-32-0095)
Winston W. Rumph (DOD 08/06/92) (250-01-18?8)
Leo A. Scheidt (DOD 01/09/92) (487-22-1531)
Prank Schmidt (DOD 07/31/90) (223-20-7616)
Richard F. Schuettner (DOD 08/26/92) (155-10-9879)
Emil H. Schultz (DOD 10/11/92) (137-10-9155)

Fitzgerald Segree (W D 07/26/91) (119-07-4660)
Leo Selico, Sr. (DOD 04/03/92) (439-26-3775)
Gustavo Serrano (DOD 10/01/90) (130-07-5356)
MacDonald Serrette (DOD 08/16/91) (416-34-0844)
Jerome A. Severe (DOD 01/01/93) (437-07-9286)
Joseph W. Shierlock (DOD 11/27/91) (249-16-4527)
Biliran O. Sierra (DOD 09/08/92) (533-26-2541)
Lawrence J. Silva (DOD 11/08/90) (019-18-2675)
Thomas Sims (DOD 02/08/91) (422-03-2297)
Pat J. Sing (DOD 06/23/92) (552-32-4382)
Walter J. Slade (DOD 10/22/90) (026-07-6005)
Joseph F. Smith (DOD 02/24/91) (052-12-8827)
Nelson Sotero Vazquez (DOD 05/17/91) (106-26-5860)
Joseph Souza (DOD 05/04/92) (027-20-2349)
Albert W. Spanraft (DOD 01/22/92) (355-12-0128)
Lanier Speed (DOD 11/18/90) (421-26-3024)
Homer Starling (DOD 01/02/95) (424-01-7089)
James C. Stewart (DOD 05/19/92) (422-05-9406)
John Stratidakis (DOD 08/13/91) (080-20-7376)
Floyal L. Suter (DOD 01/04/91) (443-34-4134)
William D. Swallows (DOD 08/11/92) (568-20-0242)
Joseph A. Tanguay (DOD 08/01/90) (059-24-0197)
Nels J. Tanula (DOD 08/27/91) (398-07-8514)
Joseph R. Taylor (DOD 08/03/90) (524-28-3524)
Earl H. Terry (DOD 05/26191) (286-18-6085)
Theodore M. Tetonis (DOD 08/07/90) (140-18-6340)
Eugene S. Thomas (DOD 06/05/91) (267-26-7809)
George E. Thompson (DOD 03/02/92) (552-22-1749)
Clyde D. Tibbs (DOD 12/13/90) (463-24-9737)
Heber C. Tolar (DOD 11/19/90) (553-14-8395)
Nicholas Torres Arieta (DOD 06/03/91) (100-12-2280)
William C. Traser (DOD 12/09/90) (223-03-9742)
Alphonse J. Tremer, Jr. (DOD 08/05/90) (416-18-1952)
Richard L. Trexler (DOD 03/05/92) (217-14-4868)
Arthur S. Turner (DOD 07/27/90) (545-28-4224)

Chris L. Turner (DOD 11/06/91) (452-54-3751)
John E. Ubl, Sr. (DOD 05/15/92) (297-07-3857)
Roy C. Uhl (DOD 01/31/92) (317-22-0988)
Henry Uribe (DOD 12/30/91) (569-30-4504)
Anneliese M. Valentine Domingo (DOD 03/03/92)
(078-26-1649)
Celestino Valverde (DOD 02/25/91) (453-18-1354)
Lawrence J. Vanderventer (DOD 04/21/91) (372-14-3531)
Constant S. Vandewouwer (DOD 08/16/91) (115-07-7206)
Bernie Vaughn (DOD 07/06/91) (223-18-2338)
Armindo Vidot (DOD 08/14/90) (189-24-5352)
Aquilino S. Villariza (DOD 01/04/91) (124-14-5077)
William G. Vogel (DOD 10/18/90) (064-16-0152)
Hans W. Wagner (DOD 09/02/91) (559-18-7960)
William M. Wagstaff (DOD 12/24/91) (086-16-3369)
George C. Walker (DOD 01/16/91) (230-22-3045)
Floyd W. Wallace (DOD 04/20/91) (217-18-3968)
Ward M. Wallace (DOD 12/22/91) (225-18-5674)
George L.A. Walrond, Sr. (DOD 07/10/91) (084-22-6986)
Carl L. Ward, Sr. (DOD 07/17/91) (413-09-4519)
Marceline I. Warden (DOD 02/07/91) (231-28-8848)
Bernard L. Weiss (DOD 12/12/91) 1375-40-9105)
Andrew W. Wells, Jr. (DOD 05/22/92) (266-05-0383)
Raymond Whaley, Jr. (DOD 10/05/92) (251-34-2891)
Joe Murry Wilkerson, Sr. (DOD 05/08/91) (421-16-6642)
Alease Williams (DOD 08/02/90) (429-03-6246)
Elmo Williams (DOD 10/11/91) (450-01-5054)
John F. Williams (DOD 09/10/91) (545-12-1825)
Raymond R. Williams (DOD 10/09/90) (263-14-5965)
Robert Williams (DOD 11/28/90) (536-16-1445)
Russell N. Williams (DOD 04/08/92) (129-14-3996)
Hulos A. Willie (DOD 02/08/91) (090-14-5906)
James Wilson (DOD 09/03/91) (436-26-4027)
Robert H. Witherspoon (DOD 08/18/90) (563-26-4008)
John Woodberry (DOD 09/11/91) (248-36-7840)

Enrique Zapata (DOD 07/06/91) (460-16-9723)
Joseph Zare (DOD 10/25/91) (155-12-2929)
Russell W. Zeller (DOD 11/22/91) (554-46-7834)

Plaintiffs (370 Decedents)

Civil No

v :

ACandS. Inc., ACMC f/k/a National Gypsum Company, Acme Brick Company, Acorn Iron & Supply Co., Allis-Chalmers Corporation, The Allpax Co. Inc., American Ship Building Co., Anchor Packing Co., Argo Intl. Corp., Armstrong World Industries, The Auburn Mfg. Co., Aurora Pump Division of General Signal Corp., Bethlehem Steel Corp., Bigelow-Liptak Corp., A. B. Boyd Co., Bryan Steam Corp., The Carborundum Co., CertainTeed Corp., Champion International, Chemseco, Coffin Pump, Inc., Coltec Industries, Inc., Alfred Conhagen, Inc., Crosby Steam & Valve Co., Crown, Cork & Seal Co., Inc., Dana Corp., The Darcoid Co. Inc., Donlee Technologies, Inc., Durabla Mfg. Co., Everlasting Valve Co., Excelsior, Inc., Fel-Pro Incorporated, Felt Products Incorporated, Fibreboard Corp., Flexitallic, Inc., Flintkote Co., GAF Corp., Gatke Corp., General Cable Co., General Refractories, Goodall Rubber Co., B. F. Goodrich, Goodyear Tire & Rubber Co., Goulds Pumps, Inc., A.P. Green Industries, Inc., Greene Tweed & Co., Hajoca Corp., Harbison-Walker Refractories Group, The Home Rubber Company, Indian Head Industries, Inc., Ingersoll-Dresser Pump, Ingersoll-Rand Corp., James Walker Mfg. Co., Janos Industrial Insulation Corp., John Crane Inc., La Favorite Industries, Inc., The Lunkenheimer Co., Melrath Gasket, Inc., Morrison Bros. Co., Mortell Company, Noland Company, North American Refractories Co., Norton Co.,

The Okonite Co., Owens-Corning Fiberglas Corp., Owens-Illinois, Inc., P P G Industries, Inc., Pecora Corp., Phoenix Speciality Manufacturing Co., Inc., Pilot Packing Co., Inc., Pittsburgh Corning Corporation, Plibrico Co., Preferred Utilities Mfg. Corp., Quaker Construction Products, Inc., Quaker Rubber Company, Quigley Co., Inc., Sherwin-Williams Co., Shook & Fletcher Insulation Co., Skinner Engine Company, Inc., T & N Industries Inc., Union Carbide Corporation, United States Gypsum Co., USX Corp., Vellumoid, Inc., Viking Pump, Inc., Warren Pumps, Inc., Zimmerman Packing & Mfg., Inc.

Defendants (93)

COMPLAINT

Plaintiffs say:

1. This Complaint is brought under Rule 20 of the Federal Rules of Civil Procedure and jurisdiction of this cause lies within the aegis of this Honorable Court by virtue of Article III, Section 2 of the Constitution of the United States, this cause being an admiralty and maritime claim, under the general admiralty and maritime law; and diversity of citizenship is asserted under 28 U.S.C. §1332, when applicable as to respective party Defendants in relation to each particular party plaintiff.

2. Plaintiffs plead in the alternative upon occurrence of a situation as stated below. Plaintiffs assert that this is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure, although here Plaintiffs rely on the diversity statute as a basis for maritime jurisdiction of the Court whereby each Plaintiff is alleged to be of a different

domiciliary than that of each Defendant, and thus a maritime cause is asserted to be tried to jury; but let it be known that in the event the fortuity of each diversity of citizenship of any plaintiff as to respective defendant should be evinced, then under such occasion this pleading contemplated as pro tanto the invocation of Rule 9(h) of Federal Rules of Civil Procedure as to such party defendant, reserving status quo as to all other defendants.

As an example of such fortuity where, unbeknownst to the pleader plaintiff X is of the same domicile and state citizenship as are defendants Y and Z, then as to those two defendants the Court alone under Rule 9(h) shall try all issues, but as to all other defendants, it remains a jury trial.

3. Plaintiff, Creighton E. Miller, Administrator of the Estates of Decedents, set forth herein, is a duly appointed representative of the respective estate by the Probate Court of the County of Cuyahoga, Cleveland, Ohio.

4. At all times relevant herein, Defendants designed, manufactured, sold or otherwise supplied for use of shipowners abroad vessels harmful toxins and carcinogens including asbestos and asbestos-containing products or machinery and equipment on which the asbestos products were placed as contemplated by and or otherwise for placement on vessels upon which Plaintiffs or Plaintiff's Decedents served during periods of time when the respective mariners as crewmen were exposed to their detriment to the afore-stated chemicals and products, suffering injury to their person or death of their being as the case may have resulted.

5. As a direct and proximate result of said exposure to asbestos products and asbestos-containing products, Plaintiffs or Plaintiff's Decedents suffered

traumatic affliction of anatomical disorder, structural changes, pulmonary diseases inclusive of which are asbestosis/ mesothelioma/lung cancer/pneumoconiosis/ chronic obstructive pulmonary disease/colon cancer/stomach cancer/rectal cancer/kidney cancer/pancreas cancer/pharynx cancer/brain cancer/other anatomical cancer, et cetera, either singularly or in combination thereof.

6. Each respective Defendant committed breach of duty to the Plaintiff-litigants by the negligent failure to reasonably adhere to safe standards of design and manufacture and failed to give warnings of the defects of the products that would result in detriment of the health exposure of human beings and further committed a breach of implied warranty of fitness of the respective products for their intended use.

7. Defendants at all times herein relevant committee acts and omissions constituting willful and wanton disregard for the safety of those to whom the asbestos would foreseeably be exposed with indifference, reckless disregard and gross negligent conduct, all to the detriment of persons so exposed including Plaintiffs or Plaintiff's Decedent herein, all of which amounts to a basis for punitive damages.

8. As a direct and proximate result of the negligent and gross negligent acts of Defendants and the breach of implied warranty aforesaid, Plaintiffs or Plaintiff's Decedents herein sustained damages as below stated, inter alia:

As to Plaintiffs:

a. loss of earnings and earning capacity, past and

future;

b. conscious pain and suffering, past and future;

c. exemplary and punitive damages;

d. any and all other compensatory damages as may be allowed upon proofs.

As to Plaintiff's Decedents:

a. loss of earnings and earning capacity during Plaintiff's Decedents' lifetime;

b. conscious pain and suffering;

c. loss of support;

d. loss of society and companionship suffered by the heirs and next of kin of Plaintiff's Decedents;

e. exemplary and punitive damages; and

f. any and all other compensatory damages as may be allowed upon proofs.

WHEREFORE, Plaintiff-litigants demand trial by jury or, in the alternative, by the Court when required, and judgment of an amount in excess of Fifty Thousand ($50,000.00) Dollars as to each Plaintiff against Defendants, jointly and severally, and appropriate costs in addition to punitive damages with respect to each Defendant, in an amount and denomination to be determined upon ascertaining during the pendency of this cause the net worth of each Defendant herein; and Plaintiff further with respect

to each Decedent, seeks such other further measures of relief as the Court may determine to be appropriate and just in the premises.

THE MARITIME ASBESTOSIS
LEGAL CLINIC, a division of THE
JAQUES ADMIRALTY LAW FIRM

BY: S/_____
LEONARD C. JAQUES
ALAN KELLMAN (#92442)
Attorney for Plaintiff-Litigants
1370 Penobscot Building
Detroit, MI 48226
(313) 961-1080

Dated: July 26, 1993

Jury Demand

Plaintiff hereby demands trial by jury.

THE MARITIME ASBESTOSIS LEGAL
CLINIC, a division of THE JAQUES
ADMIRALTY LAW FIRM

BY: S/_____
LEONARD C. JAQUES
ALAN KELLMAN (#92442)
Attorney for Plaintiff-Litigants
1370 Penobscot Building
Detroit, MI 48226
(313) 961-1080

Dated: July 26, 1993

Supreme Court, U.S.
FILED
AUG 4 1997
CLERK

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NO. 96-1940

In The SUPREME COURT OF THE UNITED STATES
October Term, 1996

The Jaques Admiralty Law Firm, *Petitioner*

v.

Argo International Corp., *et al.*, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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35 pp

I.
PARTIES TO THE LITIGATION

Respondents on this brief were awarded fees and costs in the lower court as part of the award to ACandS, Inc. *et al.*

1. The following Respondents on this brief have no parents or nonwholly-owned subsidiaries:

Auburn Manufacturing Co.
A.B. Boyd Co.
Bryan Steam Corp.
Gatke Corporation
Hajoca Corporation
Janos Industrial Insulation
Morrison Bros. Co.
Noland Company
Pecora Chemical Corporation
Phoenix Specialty Mfg. Co.
Resco Products, Inc.
Zimmerman Packing & Mfg., Inc.

2. Respondents on this brief which have parents and/or nonwholly-owned subsidiaries include:

Argo International Corp.
    Delcal Enterprises, Inc.
Carborundum, Inc., now known as Unifrax Corporation
    Kirtland Capital Partners LP
    Unifrax Holding Company
Goodall Rubber Co.
    Trelleborg AB
    Trelleborg Corporation
    Trelleborg Industries, Inc.

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IV.
CLARIFICATION OF FACTS

Petitioner contends that its due process rights were violated when the Ninth Circuit imposed sanctions without complying with Fed. R. App. P. 38, as amended. The amended language of Fed. R. App. P. Rule 38, upon which Petitioner relies, became effective on December 1, 1994,[1] after Petitioner had filed its notice of appeal with the Ninth Circuit and after requests for sanctions were filed.

Petitioner filed two notices of appeal in the United States Court of Appeals for the Ninth Circuit on April 14, 1994 and April 15, 1994.[2] Petitioner was notified that the Ninth Circuit was considering sanctions when it was served with Respondent Owens-Illinois, Inc.'s two briefs on or around October 3, 1994. (Pet., pp. App. 55-68). Petitioner failed to respond to the request for sanctions in its two reply briefs filed on or around October 31, 1994. (App. 1). The Ninth Circuit properly applied the law as it existed when the appeal and later request for sanctions were filed.

---

[1]Order of the United States Supreme Court Amending the Federal Rules of Appellate Procedure, 511 U.S. 1157 (1994) ("Order").

[2]Two notices of appeal were filed as there were two underlying actions known by their lead plaintiffs, Norman D. Abar and Creighton E. Miller as alleged administrator of the estate of Isaac W. Abraham. Thus, Petitioner filed two briefs and reply briefs in the Ninth Circuit, and Respondent Owens-Illinois, Inc. filed two response briefs in which it requested sanctions. (*See* Pet., pp. App. 55-68).

V.
ARGUMENT

The sole Question Presented for Review is whether Petitioner was denied due process by the Ninth Circuit's failure "to provide or require proper notice prior to imposition of appellate sanctions." (Pet., p. i).[3]

Petitioner presents three grounds for the grant of a Writ of Certiorari by this Court:

1. The Ninth Circuit's assessment of sanctions in the underlying case was contrary to the decisions of the other courts of appeal which have applied Fed. R. App. P. 38, as amended;

2. The Ninth Circuit departed from the accepted and usual course of judicial proceedings; and

3. This Court should decide whether the courts of appeal must strictly comply with the procedural provisions of Fed. R. App. P. 38, as amended. (Pet., pp. 7-8).

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[3]Petitioner chose to abandon the alternative relief requested in its Motion to Vacate or, in the Alternative, for a Statement of Reasons and Opportunity to Respond (Pet., pp. App. 69-76). In any case, the Ninth Circuit's discussion of the merits of the appeal in its Memorandum provides adequate explanation of the basis for the imposition of sanctions. *See Braley v. Campbell*, 832 F.2d 1504, 1514 (10th Cir. 1987); *In Re Cosmopolitan Aviation Corp.*, 763 F.2d 507, 515 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*, 474 U.S. 1032 (1985). Moreover, Petitioner had adequate opportunity to respond to the imposition of sanctions in its Reply Briefs filed in the Ninth Circuit on or around October 31, 1994, yet ignored the issue entirely. (App. 1).

These bases for the grant of Certiorari are inapposite since amended Fed. R. App. P. 38 does not apply to the facts presented in the petition. Moreover, the Ninth Circuit's assessment of appellate sanctions in this case was appropriate and well within the normal bounds of judicial proceedings.

A. The 1994 amendment to Fed. R. App. P. 38 does not control a request for sanctions filed before its effective date.

Petitioner filed its notice of appeal in the Ninth Circuit in April of 1994. At that time, Fed. R. App. P. 38 provided as follows:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.[4]

By Order dated April 29, 1994, this Honorable Court amended, *inter alia*, Fed. R. App. P. 38 to include the phrase "after a separately filed motion or notice from the court and reasonable opportunity to respond." The Order further provided:

> [T]he foregoing Amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases *thereafter* commenced and, *insofar as just and*

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[4]Fed. R. App. P. 38 (1967); *see also, Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir.), *cert. denied*, 474 U.S. 1021 (1985); *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526, 531 n. 3 (6th Cir. 1995).

> *practicable*, all proceedings in appellate cases then pending.[5]

Thus, on its face, the amendment to Fed. R. App. P. 38 applies *only* to appeals commenced on or after December 1, 1994, and *may* apply to pending proceedings if "just and practicable."[6]

It is undisputed that Petitioner's notices of appeal were filed on April 14, 1994 and April 15, 1994 and the briefs requesting sanctions were filed on or around October 3, 1994. Because these events took place before the amendment to Fed. R. App. P. 38 became effective, a separately filed motion was not required.[7] Although Fed. R. App. P. 38 is considered "procedural," this in and of itself does not trigger a retroactive application of the amendment.[8] As reflected by the Order, the Ninth Circuit was not required to comply with amended Fed. R. App. P. 38 before imposing sanctions in this case. Petitioner's argument in this regard is simply without merit.

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[5]511 U.S. 1157 (emphasis added).

[6]*See Landgraf v. USI Film Products*, 511 U.S. 244, 275 n. 29 (1994).

[7]*See e.g., Simmons*, 65 F.3d at 531 (Since the brief in which sanctions were requested was filed prior to the effective date of amended Rule 38, the court could address the request for sanctions even though a separate motion was not filed).

[8]*See Landgraf, supra* note 6.

B. There was no "just and practicable" reason for the Ninth Circuit to apply the amendment to Fed. R. App. P. 38 retroactively.

The Order allows appellate courts to apply the amendment to Fed. R. App. P. 38 to actions pending before them, if doing so is "just and practicable." These words, "just and practicable," have been given particular meaning by this Court. In *Landgraf v. USI Film Products*, the Court considered the retroactivity of changes in procedural rules. Therein the Court stated:

> Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions [to pending cases] ordinarily depends on the posture of the particular case. *See, e.g.*, Order Amending Federal Rules of Criminal Procedure, 495 U.S. 969 (1990) (amendments applicable to pending cases "insofar as just and practicable"); Order Amending Federal Rules of Civil Procedure, 456 U.S. 1015 (1982) (same).[9]

Thus, the federal courts, when considering amendments to procedural rules, may assess for themselves the propriety of applying these changes to cases pending on their dockets. As the Committee note to the original Rule states:

> [D]amages are awarded by the court *in its discretion* in the case of a frivolous appeal as a

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[9] *Id.*

> matter of justice to the appellee and as a penalty against the appellant.[10]

In the instant case, the Ninth Circuit exercised its vast discretion in declining to apply amended Fed. R. App. P. 38 to Petitioner's patently frivolous appeal.

As the facts herein demonstrate, there has been no abuse of discretion by the lower court. Petitioner received actual notice of the request for sanctions in at least two of the opposition briefs filed by respondents in the Ninth Circuit. (Pet., pp. App. 58-59, 65-66). In addition, Petitioner is a sophisticated law firm which represents clients with respect to various matters of law. As legal counsel, Petitioner knew that it must review all pleadings and briefs to fully protect itself and the interests of its clients and file appropriate responses. In this case, sanctions were clearly requested.[11] Interestingly, Petitioner *does not* argue that it was unaware of the request for sanctions in the Owens-Illinois briefs, only that the request of which it had notice did not comply with the amendment to Fed. R. App. P. 38. Under such circumstances, the lower court

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[10]Advisory Committee Note to Fed. R. App. P. 38 (1967) (emphasis added). *See also Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162, 1165 (9th Cir. 1991)("It is within this Court's discretion to impose sanctions for a frivolous appeal").

[11]For example, the section of the Owens-Illinois brief in which sanctions were requested was not an insignificant part of the brief. As the reproduction of the brief in the appendix to the petition makes clear, that particular section comprised almost one and one-half pages of the brief (between 5% and 10% of the full length of the brief). (Pet., pp. App. 58-59). The table of contents, Section V(C)(1), also clearly indicated to Petitioner that sanctions were being requested. (Pet., p. App. 56). Moreover, the brief contained a separate heading devoted to the request for sanctions (Pet, pp. App. 56, 58) and cited Fed. R. App. P. 38 in the list of authorities.

committed no abuse of discretion in declining to apply the amendment to Fed. R. App. P. 38.

Moreover, a person's knowledge of the consequences of his or her own conduct may satisfy the notice requirements of due process,[12] in which case no additional notice should be needed. As the Ninth Circuit noted in its Memorandum, Petitioner failed to adequately plead under the Federal Rules of Civil Procedure and failed to correct its pleadings when given an opportunity to do so by the District Court. Second, instead of following the normal path of appeal, Petitioner chose to challenge the District Court's dismissal order under Fed. R. Civ. P. 60(b)(6), which requires a showing of extraordinary circumstances preventing the filing of a direct appeal. (Pet., p. App. 5). Finally, Petitioner failed to demonstrate any extraordinary circumstances and simply repeated its legal arguments as the basis for Rule 60(b)(6) relief. Thus, by its own actions, petitioner had ample notice of the possibility of sanctions by the Ninth Circuit for filing its appeal.

Under these facts, where Petitioner received ample notice of the imposition of sanctions by the lower court, there is no "just and practicable" reason to apply amended Fed. R. App. P. 38 to this case. The lower court did not abuse its discretion in declining to require additional notice.

C. The Ninth Circuit's assessment of sanctions under Fed. R. App. P. 38 satisfied due process.

There is neither one set of circumstances that will always result in the imposition of sanctions nor particular levels at which sanctions will be assessed. Rather, the level of

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[12] *Link v. Wabash R. R. Co.*, 370 U.S. 626, 632 (1962).

sanctions imposed depends upon the particular conduct to be sanctioned. In turn, what process is due prior to the imposition of sanctions depends upon the level of sanctions to be assessed.[13] Before the amendment of Fed. R. App. P. 38, while the courts required satisfaction of due process in order to impose sanctions,[14] no particular form of notice was required.[15] Thus, a request for sanctions in an opponent's brief was sufficient notice that the court was considering imposing sanctions.[16] The notice requirements of due process were

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[13] *Roadway Exp. Inc. v. Piper*, 447 U.S. 752, 767 n. 14 (1980).

[14] *Id.* at 767.

[15] *See Link*, 370 U.S. at 632 (Not every order entered without notice and hearing offends due process; adequacy of notice and hearing depends to a considerable extent on party's knowledge of consequences of conduct); *Hirschfeld v. Bd. of Elections in New York*, 984 F.2d 35, 40 (2d Cir. 1993) (Raising issue of sanctions in responding papers provided clear notice); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682, 688 (2d Cir. 1989) (Proceedings sufficient to satisfy due process); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 571 (3d Cir. 1985) (Presence of statute, federal rule, ethical canon, local rule or custom, court order, or court admonition would satisfy notice requirement); *Baulch v. Johns*, 70 F.3d 813, 817-18 (5th Cir. 1995) (Counsel received adequate notice where opposing brief raised issue of frivolous appeal and counsel questioned at oral argument); *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1202 (7th Cir. 1987) (Text of Fed. R. App. P. 38 and previous decisions of the Seventh Circuit applying Fed. R. App. P. 38 constituted adequate notice); *Hatch*, 758 F.2d at 416 (Sanctions need not be sought to be awarded); *Braley*, 832 F.2d at 1514-15 (Request for sanctions in a brief where party to be sanctioned is identified satisfies notice requirements); *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1583 (Fed. Cir. 1991) (No notice in addition to request for sanctions in opposing brief required); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1178 (D.C. Cir. 1985) (Briefs on appeal sufficient to satisfy due process concerns).

[16] *See supra* note 15: *Hirschfeld*, 984 F.2d at 40; *Baulch*, 70 F.3d at 817-18; *Braley*, 832 F.2d at 1514-15; *Finch*, 926 F.2d at 1583; *Westmoreland*, 770 F.2d at 1178.

clearly satisfied herein as sanctions were requested in at least two of the opposition briefs filed in the Ninth Circuit.

The second prong of the due process inquiry is the opportunity to be heard.[17] This second prong focuses on whether the person against whom sanctions are assessed had the "opportunity" to be heard on the imposition of sanctions. Thus, the question is not whether the person has *actually* been heard, but whether the person had the *opportunity* to be heard.[18] Petitioner did not raise this issue in its Questions Presented for Review. Moreover, although Petitioner was permitted to file a reply brief in the lower court, it intentionally and blatantly ignored the request for sanctions. (App. 1). Petitioner had ample opportunity to be heard on the request for sanctions and cannot now complain that it was denied due process.

D. This case is not appropriate for review by this Court.

Even if Petitioner's case has any merit, which Respondents deny, Petitioner's argument for the Court's grant of a Writ of Certiorari is unpersuasive. This case is simply inappropriate for review by the Court.

The retroactive application of the 1994 amendment to Fed. R. App. P. 38 affects only appeals which were pending in the United States Courts of Appeals prior to December 1, 1994. Since such cases are likely to be very small in number as of this date and continually decreasing in number, a decision on the issue will have little, if any, precedential value.

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[17] *Roadway Exp.*, 447 U.S. at 767.

[18] *Boddie v. Conn.*, 401 U.S. 371, 378-79 (1971).

Petitioner alleges a split in the Appellate Courts on the application of Fed. R. App. P. 38 as amended as further proof of the alleged injustice perpetrated upon Petitioner by the Ninth Circuit. However, there is no split in the Appellate Courts on the mandatory application of Fed. R. App. P. 38. All the courts are applying Fed. R. App. P. 38 uniformly to appeals which have commenced since its effective date; Petitioner cites no authority to the contrary.

With regard to the discretionary application of the 1994 amendment to pending cases, Petitioner's contention that there is a split in the Appellate Courts is also without merit. As discussed *supra*, retroactive application of the amendment is discretionary; therefore, whether the amendment is applied to a pending case by a particular court is within the discretion of that court and depends on the unique facts of the case.[19] In short, there is no sound basis here for granting a Writ of Certiorari.

VI.
CONCLUSION

For the reasons stated herein, the petition for a Writ of Certiorari should be denied. The imposition of sanctions was in accordance with the language of Fed. R. App. P. 38 in effect at the time the appeal was filed. No circumstances exist to retroactively apply the 1994 amendment to this case, and the lower court was well within its discretion in declining to do so. Moreover, the Ninth Circuit's imposition of sanctions against

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[19]*See Landgraf, supra* note 9 and accompanying text.

Petitioner satisfied the requirements of due process. Finally, even if Petitioner's argument has any merit, which is denied, this case is inappropriate for review by this Court.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al.,	)	**No. 94-55624**
Plaintiff-Appellants,	)	
	)	
v.	)	**DC#CV-93-01120-JSR**
	)	**Southern California**
ACandS, Inc., et al.,	)	**(San Diego)**
Defendant-Appellees,	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTHERN CALIFORNIA

PLAINTIFFS-APPELLANTS' REPLY BRIEF*
ORAL ARGUMENT REQUESTED

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*The Petitioner's Reply Brief in the *Miller* matter is identical to this brief and is therefore not reproduced here.

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BACKGROUND

On July 27, 1993, plaintiff-appellants herein filed two separate complaints in the United States District Court for the Southern District of California, *Creighton E. Miller, Administrator of the Estates of Isaac W. Abrahan, et al v. ACandS, Inc., et al.* (Case No. 93 CV 1119) and *Norman Abar, et al. v. ACandS, Inc., et al.* (Case No. 93 CV 1120). Plaintiff's decedents in *Miller* and Plaintiffs in *Abar* was/were erstwhile mariners who were exposed to defendants' asbestos products while serving aboard vessels engaged in maritime commerce. As a result of this exposure, plaintiffs and plaintiff's decedents were afflicted with asbestotic diseases.

Various defendants filed motions to dismiss the complaints in these causes and, on September 9, 1993, the court issued identical orders to show cause, compelling responses to Defendants' Motions to Dismiss. (CR 119 and CR 122). On November 22, plaintiffs filed timely responses to Defendants' motions to dismiss. (CR 123; CR 237). On January 18, 1994, the district court granted defendants' motions to dismiss in each case for failure to state a claim, lack of subject matter jurisdiction, improper venue. (CR 129; CR 137). On January 20, 1994, the court entered judgments consistent with the above orders.

On January 31, 1994, plaintiff timely filed a motion for Relief from Judgment. On March 14, 1994, the court entered an order denying plaintiffs' motion for relief from judgment. On April 14, 1994 plaintiff timely filed Notices of Appeal in the above two causes which stated as follows:

> Notice is hereby given that . . . Plaintiffs in the above-named actions, appeal to the United States Court of Appeals for the Ninth Circuit

> from the Order Denying Motion for Relief from Judgment of Dismissal of the United States District Court entered in this action on the 14th day of March, 1994. (emphasis added).

CR 139: CR 164.

Defendant-Appellees make two arguments. First, defendant argues that plaintiffs are time barred from appealing the district court's order denying plaintiffs' Motions for Relief from Judgment made under Fed. R. Civ. P. 60(b). Second, defendant contends that a denial of a Motion under Rule 60(b) is not a final and appealable order. For the reasons set forth below, neither argument has merit. Thus, this Court must retain jurisdiction over this appeal for a review on the merits.

ARGUMENT

A. Plaintiffs' Appeals are Timely Under Fed. R. App. P. 4(a).

Defendant-appellee contends that plaintiff may not appeal the district court's Order of January 18, 1994. However, plaintiff has not attempted to appeal that order. Plaintiffs' notices of appeal make it patently clear that they are appealing the district court's denial of their Motions for relief from Judgment entered on March 14, 1994 in *Miller* and on March 21, 1993 in *Abar*. In *Miller*, Plaintiffs filed their Notices of Appeal on April 14, 1994, exactly 30 days after the entry of the district courts' denial of those motions as allowed by Rule 4(a).

In *Abar*, plaintiffs filed their notice of appeal on April 15, 1994, before the expiration of the thirty days prescribed by Rule 4(a).[1]

There is no dispute that the notices of appeal from the denial of Relief from Judgment are timely. Even defendant concedes that this Court may review a denial of a Rule 60(b) motion under the abuse of discretion standard.

In fact, there is a recent Ninth Circuit case directly on point which controls the issues raised herein. In *Yniques v. Cabral*, 985 F.2d 1031 (9th Cir. 1993), the district court *sua sponte* dismissed plaintiff's complaint without a hearing. Plaintiff did not file a Notice of Appeal from this Order. Instead, plaintiff filed a motion for reconsideration of the dismissal order pursuant to Fed. R. Civ. P. 60(b). The district court declined to reconsider its dismissal order on May 5, 1991. Plaintiff filed his notice of appeal from the court's denial of the motion to reconsider within the thirty day time limit, on May 31, 1991. This Court of Appeals held:

> Fed. R. App. P. 4(a)(1) requires notice of appeal to be filed within thirty days of entry of

---

[1]Defendant argues that the *Abar* appeal is untimely in that it is not stamped "filed" until April 15, 1994. Defendant's argument, however, is without merit. As defendant notes, there are three different dates set forth in the docket for entry of the *Abar* order denying reconsideration. Entry No. 136 states "Entry date 03/21/94." Plaintiff's appealed well within 30 days of this docket entry date. It is black letter law that the "time for appeal commences to run from the date on which the judgment that has thus been set forth in a separate document is entered in the civil docket." *Moore's Federal Practice*, Vol. 9 §204.03, p. 4-18; *see also* Fed. R. Civ. P. 79; *Herrera v. First Northern Savings and Loan Assoc.*, 805 F.2d 896 (10th Cir. 1986). Entry No. 138, upon which defendant apparently relies, merely indicates that the origin order in the *Miller* case was originally entered on March 15, 1994.

> judgment. [Plaintiff] failed to file a timely notice of appeal from the district court's dismissal order. [Plaintiff did, however, file a notice of appeal within thirty days of the court's denial of his Rule 60 motion. That notice of appeal, although timely, is sufficient only to secure jurisdiction over the denial of reconsideration. *Browder v. Director, Dept. of Corrections,* 434 U.S. 257, 263 n. 7 (1978); *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1546 (9th Cir. 1990); *Hayward v. Britt,* 572 F.2d 1324, 1325 (9th Cir. 1978) (per curiam); *see also* Wright and Miller, *Federal Practice and Procedure*: Civil §2871, at 259 (West 1973) ("[A]n appeal from the denial of the [Rule 60] motion brings up for review only the order of denial itself and not the underlying judgment.")

Yniques, 985 F.2d at 1033.

Given the uncontradicted authority in the Ninth Circuit in this regard, Defendants' arguments must be viewed as bad faith. Moreover, Defendants' failure to advise the Court of the uncontradicted authority cited above is clear violation of the Federal Rules.

B. The Order Denying the Plaintiffs' Rule 60(b) Motion is Appealable.

Defendant-appellees next argue that the court's denial of plaintiffs' rule 60(b) motion is not appealable. The most significant issue on appeal will be whether the judge abused his discretion in failing to allow joinder of these asbestos victims in a single suit. The outcome on appeal will impact the ability

of hundreds of thousands of asbestos victims to obtain access to the courts.

Fel-Pro correctly cites *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064 (4th Cir. 1993), as the controlling case in this matter. In fact, *Domino Sugar* upheld appellate jurisdiction, as we ask the Court to do here.

Domino Sugar, supra, holds that a plaintiff may appeal an order dismissing his claims without prejudice if the alleged deficiency can not be corrected by amendment of the pleadings. *Id.* at 1066. The Court went on to state:

> Under this approach, an appellate court may evaluate the particular grounds for dismissal in each case to determine whether plaintiff could save his action by merely amending his complaint. *Id.* at 1066-67.

This Court must distinguish between Mr. Aaberg, who was purportedly given an opportunity to "save his action" by amendment and the 999 other plaintiffs whose claims were summarily and, without the option of amendment, dismissed for improper joinder. Even Fel-Pro acknowledges that these 999 plaintiffs were left no option under the court's order but to file "individual, particularized complaints."

Because no amount of amendment could cure the perceived joinder defect, nor was an opportunity for such amendment contemplated or allowed by the court, *Domino Sugar* mandates the exercise of appellate jurisdiction.

When claims are separated pursuant to Rule 21 for improper joinder, each severed part constitutes a unit of adjudication for the purposes of appeal. Thus, if a final order

or judgment is entered disposing of all the claims of all parties as to the severed cause, the order or judgment is final and appealable. *United States v. O'Neil,* 809 F.2d 361 (4th Cir. 1983); *Hebel v. Ebersold,* 543 F.2d 14 (7th Cir. 1986); *Spencer, White & Prentis, Inc. v. Pfizer, Inc.*, 498 F.2d 358 (2d Cir. 1974).

C. Rule 20 Joinder Is Appropriate In The Above Captioned "Mass Tort" Case.

Defendant-appellees make the outrageous argument that plaintiffs have failed to establish that there is a "set of occurrences common to all plaintiffs" or "a common issue of law or fact as to all plaintiffs." Again, in their overzealous attempt to justify the district court's disenfranchisement of 1000 asbestos victims of their causes of action against these 94 asbestos manufacturers, Defendant-appellees ignore even the obvious. That these criteria have been established is hardly in dispute.

It can hardly be challenged that these plaintiffs are bound by a common "set of occurrences" in that they were exposed to defendant's asbestos products while serving aboard ships in the maritime careers. It is not said, and it need not be the fact, that all of the Defendants' asbestos products were placed on one ship. It will be established, however, that these Defendant distributors and manufacturers put asbestos products on ships universally within the American Merchant Marine during relevant times and each of the Defendants stood out as energetic competitors vying for the marine market in supplying shipboard asbestos products to the marine industry. Each Defendant placed products aboard one or more ships on which each Plaintiff sailed: therefore, each Plaintiff in this cause was exposed to friable asbestotic products of each Defendant.

Defendant-appellees' reliance on *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2nd Cir. 1993) is in error. *Malcolm* had nothing to do with Rule 20 joinder. To the contrary, *Malcolm* held that consolidation under Fed. R. Civ. P. 42(a) of 48 claims for trial was improper. *Id.*

> In the instant action, 600 cases were consolidated. The thread upon which all 600 cases hung was that each plaintiff had been exposed to asbestos in one or more of over 40 power-generating stations, or "powerhouses" as they are called in New York State.
>
> Forty eight were selected from the 600 cases for *trial* on a reverse bifurcated basis, *i.e.* damages to be tried first and then liability.

Malcolm, 995 F.2d at 350. Interestingly, no challenge was ever made to the initial consolidation of 600 cases for pre-trial proceedings. In this regard, the Court noted:

> Federal Rule of Civil Procedure 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in this action..." As we recently noted,
>
> **Consolidation of tort actions sharing common questions of law and fact is commonplace. This is true of asbestos-related personal injury cases as well.**
>
> The trial court has broad discretion to determine whether consolidation is appropriate. In the

> exercise of discretion, courts have taken the view that considerations of judicial economy favor consolidation. However, the discretion to consolidate is not unfettered. Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial.

Malcolm, 995 F.2dat 350.

It has never been plaintiffs' contention or intention that all of these cases against all of these defendant asbestos manufacturers be tried at one time. It may ultimately happen that those cases which are not resolved during the MDL pre-trial discovery and settlement procedures will be separated into groups for consolidated trial based on such factors as service history as set forth in *Malcom, supra*. This prospect, however, is miles down a very long road.

In any event, even the *Malcolm* Court acknowledged that individual adjudication was no longer a viable option for federal courts dealing with asbestos litigation.

> One of the greatest challenges facing both state and federal courts is the crush of tort suits arising from the extensive use of asbestos as flame-retardant insulation throughout much of this century. Asbestos litigation today constitutes the largest mass toxic tort in the United States.
>
> * * *
>
> Asbestos fibers - - which contain highly toxic carcinogens - - have debilitated and killed many workers. Asbestos-related injuries are

> characterized by prolonged latency periods and typically do not become apparent until years, and in some cases decades, after exposure.
>
> * * *
>
> For example, recognizing that "[t]he heyday of individual adjudication of asbestos mass tort lawsuits has long passed," the Judicial Panel on Multidistrict Litigation ordered the pre-trial consolidation of 26,639 pending asbestos cases in July 1991.

Malcolm, 995 F.2d at 348.

In contrast to *Malcolm, supra,* wherein a large number of cases were consolidated for trial, plaintiffs herein have employed Rule 20 joinder for the *pre-trial* phase of these proceedings. Joinder of plaintiffs and defendants is premised on the mandate of coordinated pre-trial proceedings established by multi-district litigation. All of the asbestos cases brought by these merchant mariners are destined to be set on the special maritime asbestos docket, 2-MDL-875 for the purposes of coordinated discovery and settlement negotiations. Under 2-MDL-875, *there is no difference in treatment of these cases whether filed individually or as joined actions.*

Plaintiffs remain mindful of the consideration set forth in *Malcolm, supra,* that efficiency be achieved without substantial prejudice to either party.

> Addressing the complaints of hundreds of thousands of severely injured asbestos plaintiffs, while safeguarding the rights of the defendants, all the while searching for equitable

resolutions in each case, is a herculean task. Many of the asbestos victims suffered exposure for decades and at many different work sites. Finding an appropriate forum to resolve all these claims with minimal delay is the goal. Faced with this challenge, district judges throughout the country have reacted with commendable ingenuity. Pre-trial consolidation for the purposes of discovery, the appointment of special masters to expedite settlement, and especially, the liberal use of consolidated trials have ameliorated what might otherwise be a sclerotic backlog of cases.

* * *

The benefits of efficiency can never be purchased at the cost of fairness. As we recently stated:

> [W]e are mindful of the dangers of a streamlined trial process in which testimony must be curtailed and juror must assimilate vast amounts of information. The systemic urge to aggregate litigation must be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's - - and defendant's - - cause not be lost in the shadow of a towering mass litigation.

Malcolm, 995 F.2d at 349.

It is interesting that, even in Defendant-appellee's brief, they have failed to identify a **single instance of prejudice** which will be visited upon them by joinder, let alone substantial prejudice.[2] In the context of MDL and specifically the special maritime docket, Rule 20 joinder is the only efficient mechanism by which these asbestos victims can access the court system. Unlike joinder in any other context, a denial of the right to join claims is a denial of justice altogether for many of these claimants.

D. Plaintiffs' Complaint Meets the Notice Pleading Requirements of Rule 8(a). The Court's Order Compelling More Detailed Allegations is Reversible Error.

Defendant-appellees argue that "The Complaint was utterly void *of factual information* that it failed to comply with the most rudimentary requirements of notice pleading." Defendants just don't get it. There is no requirement to plead "facts" under Rule 8(a). To the contrary, pleading "specific facts" is "inconsistent with the modest pleading requirements of Rule 8(a)." *DiMella v. Gray Lines Boston, Inc.,* 836 F.2d

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[2]We note that law firms representing asbestos manufacturers stand to amass huge fortunes by the parceling of claims into single units. In Ohio, for instance, where individual claims have been pursued, defense firms are able to file the identical motion hundreds, if not thousands, of times. Responses and replies to such motions increase the work load of plaintiffs and the court proportionately. The amount of paper which is being expended in the effort simply to lodge objections to Defendant's motions for the record is unprecedented. Yet, there is little we can do to stop this sacrilege. Every piece of paper represents another dollar bill in the pocket of a defense firm. Their self-interest, of course, is always to increase, not decrease, the effort involved.

718, 721 (1st cir. 1988) (reversing district court's dismissal of complaint for failing to plead "facts").

"The modern philosophy is that pleadings do little more than indicate generally the type of litigation involved... A generalized summary of the case that affords fair notice is all that can be expected." *Moore's Federal Practice,* 2A, p. 8-11. "The history of litigation under the [old] Equity Rule led the Advisory Committee to conclude that the requirements of pleading facts was illusory and unsound." *Moore's Federal Practice,* 2A, p. 8-54. "No pleading of 'facts,' 'ultimate facts,' or 'facts sufficient to constitute a cause of action' is required." *Moore's Federal Practice,* 2A, p. 8-55. *See also Walker v. South Central Bell Tel.,* 904 F.2d 275 (5th Cir. 1990) (no need to plead elements of cause of action); *Wade v. Johnson Controls, Inc.,* 693 F.2d 19 (2d Cir. 1982) (no pleading of facts required under Rule 8(a)); *Great Atlantic & Pacific Tea Co. v. Amalgamated Meat Cutters,* 410 F.2d 650 (8th Cir. 1969) (specific facts not required); *Austin v. House of Vision,* 385 F.2d 171 (7th Cir. 1967) (plaintiff need only make a brief statement sufficient to give notice of the claim against it).

Yet, the district court has required plaintiffs to plead specific and detailed facts with regard to admiralty jurisdiction, product identification and exposure.

With regard to admiralty jurisdiction, the law in this regard could not be more clear and is uncontroverted. Pleading "Rule 9(h)" in the complaint is a *per se* sufficient to plead admiralty jurisdiction. *See T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc.,* 702 F.2d 585, 588 (5th Cir.), *cert. denied,* 464 U.S. 847, 104 S.CT. 151, 78 L.Ed.2d 141 (1983); *cf.* 5 Wright & Miller, Federal Practice and Procedure: Civil 2d §1313 at 719 (1990) (preferred technique is to expressly invoke Rule 9(h). *Teal v. Eagle Fleet, Inc.,* 933 F.2d

341, 345 (5th Cir. 1991) (same). Defendant-appellees have failed to cite a single case to the contrary. Under the authority set forth above, requiring plaintiffs to plead such specific facts is inconsistent with and directly contrary to Rule 8(a)'s mandate of a "short and plain statement of the claim."

Plaintiffs have, as set forth in Appellees own Brief, put these defendants on notice that they are merchant mariners, bringing claims under general maritime product liability law for injuries resulting from exposure to asbestos products manufactured and/or distributed by these defendants while serving aboard vessels. By their own words, Defendant-appellees are on notice of the "the basis of the complaint and the legal grounds claimed for recovery." *See Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990).

Finally, the district court completely ignores the fact that all of the matters which defendants seek to have specifically plead in the complaint will be the subject of discovery as part of MDL or, alternatively, as a pre-requisite to settlement.

While documentation of each plaintiff's service history in the merchant marine, matters of product identification and exposure may be possible for individual filings against a relative few defendants, such pleading would be a virtual impossibility herein. Even a complaint brought by a single merchant mariner against 94 defendants would require hundreds (if not thousands) of pages under the court's ruling. Such a complaint could not be filed consistent with Rule 8(a) and Rule 11. The district court's insistence on creating special pleading requirements and its refusal to consider the availability of MDL has placed these asbestos victims in a "no win" "no option" situation. These asbestos product

manufacturers will have succeeded in their most lofty goal, barring asbestos victims from the courthouse altogether.

On the other hand, such specific facts can efficiently be disclosed in discovery. Such discovery would, as contemplated by MDL, occur over a manageable period of time in a coordinated and organized fashion.

CONCLUSION

Consistent with their behavior before the lower court defendant seeks to cloud the truth, to incite confusion and stonewall justice. There is no question that the immense human tragedy of asbestos exposure instigated by these Defendants has brought upon litigation of heretofore unprecedented proportion. It is the breadth of the tragedy bestowed on the victims of asbestos exposure by these Defendants which drives the breadth of this litigation. It is unconscionable that they should now complain and point a finger of impropriety at their victims. Joinder in the context of mass tort is consonant with the very ethic of federal civil procedure which mandates that courts guarantee litigants a

forum "to secure the just, speedy and inexpensive determination of every action." Fed.R. Civ. P. 1.

RESPECTFULLY SUBMITTED,

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